Supreme Court, U.S.
FILED

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No. ___

In The Supreme Court of The United States

ORION RESERVES LIMITED PARTNERSHIP,
Petitioner,

v.

KEN SALAZAR, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, *ET AL.*,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court below was obliged to follow a prior holding by this Court which this Court has not overruled, and which would have been outcome determinative -- a holding that a challenge to the validity of a mining claim based on a lapse in performance of annual work may be brought only during the lapse and prior to resumption of the work.

II. Whether the Due-Process Clause of the Fifth Amendment and the Administrative Procedure Act require Interior Department officials to provide notice of charges and an opportunity for an evidentiary hearing before they declare mining claims null and void.

PARTIES TO THE PROCEEDINGS

Petitioner, pursuant to Rule 29.6, states that it is a privately held limited liability partnership. There is no publicly held corporation that owns more than 10 % of the partnership.

Other than Petitioner, the only parties in the United States Court of Appeals for the District of Columbia Circuit, whose decision is sought to be reviewed in this Court, were the U.S. Department of the Interior, Secretary of the Interior Dirk Kempthorne, now replaced by his successor-in-office Ken Salazar, Jim Caswell, Director of the Bureau of Land Management, and Selma Sierra, Director, Utah State Office of the Bureau of Land Management, Department of the Interior.

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The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 553 F.3d 697 and is found in the Appendix at page 1a. The United States District Court for the District of Columbia issued two rulings: the first on summary judgment, *Memorandum Opinion,* March 31, 2006, found in the Appendix at 43a; and the second on remedy, *Memorandum and Order;* June 28, 2007, found in the Appendix at 24a. No official citation exists for either district court ruling. The opinion of the Interior Board of Land Appeals ("IBLA"), *Crippled Horse Investments, L.P., Estate of Frederick H. Larson,* May 10, 2004, is reported at 161 IBLA 264 and is found in the Appendix at 57a. The opinion of the Utah State Office, Bureau of Land Management, United States Department of the Interior, *Crippled Horse Investments, L.P., Estate of Frederick H. Larson,* September 2, 1999, is found in the Appendix at 81a. No official citation exists for that ruling.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit, which reversed the district court's summary judgment, which reversed the Interior Board of Land Appeals, which affirmed the decision of the Utah State Office of the Bureau of Land Management, U.S. Department of the Interior, was handed down on January 23, 2009. Timely petitions for rehearing and rehearing en banc were denied on March 13,

2009. 88-89a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

This first Question Presented by this Petition involves the statutory right to preserve an unpatented mining claim by resuming work after a lapse in work and before assertion of a challenge to the validity of the claim based on the lapse. That right is granted by Section 5 of the General Mining Law of 1872, 17 Stat. 91, 92 (later codified with non-substantive changes as 30 U.S.C. § 28):

> On each claim located after the passage of this Act, and until a patent shall have been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year. . . . [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made: *Provided,* that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure and before such location.

The first Question Presented also involves the Savings Clause of the Mineral Leasing Act of 1920, 30 U.S.C. § 193:

> The deposits of . . . oil shale . . . on lands valuable for such minerals . . . shall be

> subject to disposition only in the form and manner provided in this Act, except as to valid claims existent on the date of passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

The second Question Presented involves the Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The second Question Presented also involves the rights afforded by the Administrative Procedure Act ("APA") to notice of charges and an opportunity for a hearing and to judicial review of preliminary agency action on review of final agency action, 5 U.S.C. §§ 554 and 704:

> (a) . . . [I]n every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . . (b) Persons entitled to notice of an agency hearing shall be timely informed of—(1) the time, place, and nature of the hearing . . . and (3) the matters of fact and law asserted . . . (c) The agency shall give all interested parties opportunity for . . . (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice . . . .

. . . .

> A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

In addition, the second Question Presented involves 43 C.F.R. § 4.415:

> Either an appellant or an adverse party may, if he desires a hearing to present evidence on an issue of fact, request that the case be assigned to an administrative law judge for such a hearing. . . . The allowance of a request for hearing is within the discretion of the Board, and the Board may, on its own motion, refer any case to an administrative law judge for a hearing on a question of fact.
>
> If a hearing is ordered, the Board will specify the issues upon which the hearing will be held . . . .

STATEMENT

Interior Department officials did not challenge the validity of Petitioner's[1] pre-1920 Leasing Act mining claims until 1999. At that time, the Utah State Office of the Bureau of Land Management ("BLM") declared the claims abandoned, and void for presumed lapses in performance of annual

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[1] "Petitioner" includes predecessors-in-interest.

assessment work for various years between 1917 and 1970. 76-78a, 85a. It is undisputed that the work resumed by 1970 and continued for each subsequent relevant year. BLM's presumption of pre-1970 lapses depended on a factual inference -- that the absence of a recorded affidavit of work for a year indicated that the work had not been done for the year.[2] The declaration cited no other evidence of claimowner intent to hold or abandon the mining claims. No notice of charges or opportunity for a hearing preceded the declaration.[3]

Thus Interior's 1999 challenge was late, under both the terms of Section 5 of the 1872 Mining Law and the holding in *Wilbur v. Krushnic*, 280 U.S. 306, 317-318 (1930), construing the Savings Clause of the Leasing Act:

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[2] The BLM declaration appeared to rely, at least in part, on a Utah statute that in terms forfeited a claim for failure to record an affidavit. 85a. BLM was seemingly unaware that in 1901 the Utah Supreme Court had negated the forfeiture provision as in conflict with Section 5 of the 1872 Mining Law inasmuch as that did not require recording of affidavits to preserve a claim, in *Murray Hill Mining & Milling Co. v. Havenor*, 66 Pac. 762, 765. With that decision called to its attention and recording merely optional under Utah law, IBLA construed the BLM declaration as based on the inference of no work from the absence of a recorded affidavit. 78a. It is undisputed that federal law did not require recording during the relevant years.

[3] In 2004 the IBLA affirmed the BLM declaration. 80a. Petitioner promptly sought review in the United States District Court for the District of Columbia. That court had jurisdiction to review Interior's decisions pursuant to 28 U.S.C. §§ 1331, 1361, 1391 and 2201-2202, and the Administrative Procedure Act, 5 U.S.C. §§ 500-599.

> It is not doubted that a claim . . . could be maintained by the performance of annual assessment work of the value of $100; and we think it is no less clear that after failure to do assessment work, the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened; . . . .

The Court of Appeals' decision in this case concluded that *Hickel v. Oil Shale Corp*, 400 U.S. 48 (1970), overruled the *Krushnic* holding. That was error. *Hickel* construed the Savings Clause of the Mineral Leasing Act, 30 U.S.C. § 193, to establish the showing that Interior must make to invalidate a claim for non-performance of work -- a failure of "substantial compliance" with the statutory work requirement. *Hickel* did not address the time by which a challenge must be brought, and thus did not overrule the *Krushnic* holding that a challenge must be brought prior to resumption of work.

The Court of Appeals acknowledged that *Hickel* did not say that *Krushnic* was overruled. 15a. It nevertheless found overruling implicit in the creation of the "substantial compliance" criterion.[4]

The Court of Appeals did not say how that "overruling" could be reconciled with the fact that

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[4] 15a:

> The Mining Law's resumption exception was thus replaced by *Hickel's* "substantial compliance" test, and [Petitioner] Orion's reliance on prior cases suggesting a resumption right that survived the Leasing act is misplaced

two Members of the *Hickel* Court dissented saying they would affirm unless *Krushnic* were overruled. 400 U.S. at 61. Orion had argued the dissent in its briefs. Obviously, the *Hickel* majority had privately addressed whether to overrule *Krushnic* but decided not to.[5]

There is no inconsistency between the *Krushnic* holding and the "substantial compliance" test. Indeed, Interior had assured the *Hickel* Court that it could live with the *Krushnic* holding.[6]

In sum, it is only the Court of Appeals' decision that has overruled the *Krushnic* holding. That decision faults Petitioner for not producing evidence of performance of work as far back as 1917. 19a. There is no reason to believe that *Hickel* intended to place such a burden on a claimowner. In contrast, *Krushnic* requires a challenge during a default, when evidence whether work has been recently performed should be readily available. *Krushnic* thus would bar ancient claims. This Court found such claims repugnant as early as Chief

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[5] The Supreme Court knows how to state quite clearly that it is overruling a prior holding. *E.g., Agostini v. Felton*, 521 U.S. 203, 235 (1997).

[6] At Note 21 on Page 48, Interior's brief to the Supreme Court in *Hickel* stated that it viewed *Krushnic*

> as holding only that the 1920 Act had not by itself worked the necessary withdrawal of land from location, and that at the least some affirmative government action to withdraw the lands during a period of assessment work lapse was called for. Whether or not such a holding is also questionable, it imposes no substantial burden on the development or administration of the public lands.

Justice John Marshall's opinion in *Adams v. Wood*, 6 U.S. (2 Cranch) 336, 341 (1805), which like this case involved a forfeiture.

The second Question Presented implicates the Court of Appeals' affirmance of Interior's view that it could forfeit Petitioner's mining claims[7] without prior notice of charges because Petitioner had raised no factual dispute. That view assumes, erroneously, that Interior afforded Petitioner a proper opportunity to raise factual disputes. BLM's declaration forfeiting Petitioner's mining claims both began and ended an adjudication. It was final, subject only to an appeal.

There thus was no way to determine whether a factual dispute existed. Only one side had spoken. This case is quite different from two-sided adjudications, where pleadings may establish the absence of a material factual dispute, or where affidavits are submitted but go unchallenged after an opportunity for challenge. Notice of charges followed by an opportunity for the charged party to respond is inherent in the Fifth Amendment and APA (5 U.S.C. § 554) rights to an adjudicatory hearing.

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[7] Mining claims are real property. *E.g., Manuel v. Wolf*, 152 U.S. 505, 510-511 (1894):

> It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States, and that when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession.

Petitioner's predecessor in interest did appeal, to the Interior Board of Land Appeals ("IBLA"), but that proceeding was an appeal. It was not a hearing.

IBLA could have called for or granted an opportunity for the submission of evidence, but did not. Section 4.415 of 43 C.F.R. authorizes IBLA to order a hearing on its own motion. Parties also may request a hearing, but IBLA has discretion to deny the request or to specify the factual issues. No one requested a hearing.[8] Yet IBLA said BLM Utah had made out a prima facie case of invalidity that shifted the burden of proof to Petitioner, as if the proceeding had been a two-sided evidentiary hearing. 75a. Significantly, IBLA neither cited 43 C.F.R. § 4.415 nor identified any stage of the proceedings that called for the submission of evidence.[9]

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[8] Petitioner's predecessors in interest repeatedly requested a normal administrative contest adjudication of all available charges of invalidity of the mining claims. They were complaining in the U.S. District Court for the District of Utah of unreasonable delay in Interior's processing of the applications to patent the claims, which they filed with Utah BLM in 1989. In Petitioner's view, the delay would have been aggravated by a hearing limited to annual-work issues. Despite this Court's ruling in *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 (1980) -- that Congressional inclusion of oil shale in the 1920 Mineral Leasing Act constituted a finding that oil shale was valuable -- Interior has consistently since asserted that oil shale is not valuable, in other litigations, and in a 1997 contest complaint against two of the mining claims in this case. That complaint also charged invalidity for a long past work lapse.

[9] In various administrative contest proceedings involving other oil shale mining claims where a hearing followed notice of charges, claimowners have introduced extensive evidence relevant to BLM's key factual inference in this case

The Court of Appeals also faulted Petitioner for not offering evidence, before Interior (or in court, as if the case were not to be reviewed on the record before the agency). 19a. The Administrative Procedure Act, 5 U.S.C. § 704, however, makes the Utah BLM declaration reviewable in court regardless whether a party pursues an optional remedy. Section 704 thus precludes imposition of an exhaustion requirement or sanction for not pursuing an optional and discretionary proceeding through IBLA. *Darby v. Cisneros,* 509 U.S. 137, 147 (1993). Nonetheless, by affirming IBLA, the Court of Appeals in effect did impose an exhaustion requirement, contrary to Section 704 and in conflict with *Darby v. Cisneros.*

REASONS FOR GRANTING THE PETITION

The refusal of the Court below to respect the holding of this Court in *Wilbur v. Krushnic*, 280 U.S. 306, 317-318 (1930) -- that the United States may challenge a claim for a lapse in work only during the lapse -- is in clear conflict not only with that holding but more generally is in conflict with this Court's insistence that it alone has the prerogative to overrule its prior holdings. Lower courts are not to conclude that rulings in other lines of cases which

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that the absence of an affidavit indicates non-performance of work. *See, e.g., TOSCO Corp. v. Hodel,* 611 F.Supp. 1130 (D. Colo. 1985). Petitioner could introduce the same evidence, as well as evidence negating claimowner intent to abandon the claims which Petitioner contends is relevant under *Hickel* and this Court's construction of *Hickel* in *United States v. Locke*, 471 U.S. 84, 101-102 (1985).

they believe cast doubt on the vitality of a holding by this Court permit them to treat the holding as overruled. *Agostini v. Felton,* 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson American Express, Inc.,* 490 U.S. 477, 485 (1989). That insistence is well designed to achieve uniformity in the application of federal law throughout the federal and state court systems. To treat like cases alike is a fundamental precept of even-handed administration of justice. The doctrine of *stare decisis* requires such even-handed treatment.

The ruling below conflicts with rulings of other Circuit Courts of Appeal that do respect holdings that the Supreme Court has not overruled. *Agostini* is such a case.

The first Question Presented is central to maintaining the proper relationship between this Court and the lower courts. There is, and must be, only one court that is supreme.

The second Question Presented arises in a Constitutional as well as a legislative context. This Court construed the Administrative Procedure Act's right to notice of charges and an opportunity for an evidentiary hearing broadly because the Constitution broadly provides that right. *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49-51 (1950). The decision below conflicts with that construction.

The APA applies to a host of administrative proceedings, ones for which no other specific adjudication provisions have been legislated. The scope of the rights to notice of charges and to a subsequent opportunity for an evidentiary hearing are of widespread and fundamental concern. They

are legal issues of national importance and they warrant this Court's attention.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 16, 2008

Decided January 23, 2009

No. 07-5281

ORION RESERVES LIMITED PARTNERSHIP,
APPELLEE/CROSS-APPELLANT

v.

KEN SALAZAR, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, ET AL.,
APPELLANTS/CROSS-APPELLEES

Consolidated with 07-5290

Appeals from the United States District Court
for the District of Columbia
(No. 04cv00791)

Robert H. Oakley, Attorney, U.S. Department of Justice, argued the cause for appellants/cross-appellees. With him on the briefs was *Ellen J. Durkee*, Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Donald L. Morgan argued the cause and filed the briefs for appellee/cross-appellant.

Before: GINSBURG, GARLAND, and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge*: This appeal involves a challenge by Orion Reserves Limited Partnership (Orion) to a decision of the Department of the Interior (Interior) invalidating 156 oil shale mining claims on federal land. The district court concluded that Interior's decision was arbitrary and capricious. We reach the opposite conclusion, which is compelled by the Supreme Court's holding in *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970), that when a party substantially fails to perform the assessment work required by federal law it loses its claim to mine oil shale.

I.

A.

To encourage mining in the western United States, Congress enacted the General Mining Law of 1872 (Mining Law), 30 U.S.C. §§ 22–54 (2000), declaring valuable mineral deposits in federal lands "open to exploration and purchase," *id.* § 22. The Mining Law provides that citizens may stake, or "locate," claims to extract minerals without prior government permission and without paying royalties to the United States. *Id.* § 26. Claimants may also apply for purchase of a deed, or "patent," conveying full legal title to the land on which their claims are located. *Id.* § 29.

Even without a patent, claimants can maintain their mining rights indefinitely so long as they comply with federal, state, and local requirements. *Id.* §§ 26, 28. Among these obligations is a duty to perform annual assessment work. The Mining Law requires that "until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year." *Id.* § 28. When a claimant fails to perform this annual assessment work, his claim is "open[ed] to relocation . . . as if no location of the [mineral deposit] had ever been made." *Id.* In other words, if a claimant does not complete the required annual labor or improvements, he will lose his rights in the land to a competing claimant who does. If, however, a claimant who has failed to perform assessment work later resumes work before anyone else has staked a competing claim, his original claim remains intact under a statutory exception known as the "resumption provision." *Id.* After passage of the Mining Law, Interior promulgated regulations stating that failure to perform required annual assessment work would "subject a claim to relocation" unless the claimant "resumed work after such failure and before relocation." *Nature and Extent of Mining Claims*, 37 Pub. Lands Dec. 757, 759 (1909).

The Mineral Leasing Act of 1920 (Leasing Act), 30 U.S.C. §§ 181–287, authorized Interior to take a more active role in regulating mining on federal lands. Replacing the system of location and patent for oil shale (and several other minerals), the Leasing Act requires new claimaints to lease mined land from the Secretary of the Interior and to pay the federal government annual rental fees and

royalties to obtain "the privilege of mining, extracting and disposing of" valuable minerals. *Id.* § 241. Of relevance here, claims made under the Mining Law's system of location and patent were preserved under a "savings clause," provided those claims were "thereafter maintained in compliance with the laws under which initiated." *Id.* § 193. Interior subsequently promulgated revised regulations with a preface noting that regulations associated with the Mining Law no longer apply to minerals, like oil shale, listed in the Leasing Act, "except as to valid claims" existing at the enactment of the Leasing Act "and thereafter duly maintained pursuant to the law under which located." *Nature and Extent of Mining Claims*, 49 Pub. Lands Dec. 58, 58 Note (1923).

B.

This case involves Orion's attempt to patent 156 oil shale mining claims in Uintah County, Utah that its original predecessor-in-interest located between 1917 and 1919 under the Mining Law. It was not until 1988, however, that another of Orion's predecessors filed patent applications for the claims. In the course of reviewing these applications, the Bureau of Land Management (BLM), a division of Interior, challenged two of Orion's claims, alleging they were invalid because, among other things, Orion's predecessors had failed to perform annual assessment work for significant periods of time. The parties agreed to put the matter on hold until Interior finished processing Orion's other patent applications. The BLM continued its investigation of Orion's claims and discovered a substantial number of years between 1920 and 1970 in which no

affidavits, required annually by state law as a record that assessment work was completed, were filed. Although work records differ for each of the 156 claims, with lapses apparently ranging from 18 to 50 years, it was not until 1970 that Orion's predecessors consistently performed at least $100 worth of assessment work each year and made the requisite filings. On this basis, the BLM declared Orion's 156 oil shale claims void. *Crippled Horse Invs., L.P.*, 3833 (UT932-OA) UMC65858 (Bureau Land Mgmt. Sept. 2, 1999) (*Crippled Horse I*).

Orion appealed the BLM's decision to the Interior Board of Land Appeals (IBLA).[1] Orion did not dispute the missing assessment work records, but argued that it had nevertheless preserved its claims under longstanding judicial and departmental interpretations of federal law, requiring only that Orion resume annual work at some time, which it had done. The IBLA rejected Orion's argument and concluded that Supreme Court precedent requires that claimants "substantially satisfy" the Mining Law's annual assessment work obligation in order to maintain claims under the Leasing Act's savings clause. *Crippled Horse Invs., L.P.*, 161 I.B.L.A. 264, 273–74 (2004) (*Crippled Horse II*). Orion's ultimate resumption of work in 1970 could not revive claims forfeited by its decades-long failure to perform the required annual assessment labor or improvements. *Id.* at 277. Orion's failure to file work affidavits for numerous years made out a prima facie case that the work was not performed in those years. *Id.* at

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[1] The IBLA is Interior's review authority charged with deciding, on behalf of the Secretary, matters relating to the use and disposition of public lands and their resources. *See* 43 C.F.R. § 4.1(b)(3).

274-75. Because Orion did not proffer evidence that assessment work was in fact done in years for which no affidavits were filed, the IBLA held that its claims were invalid. *Id.* at 277.

Orion brought suit in the United States District Court for the District of Columbia challenging the IBLA decision under the Administrative Procedure Act. The district court bifurcated the case, addressing first the merits of the IBLA decision and postponing until later Orion's separate and contingent claim that Interior failed to process its patent applications in a timely fashion. On March 31, 2006, the court granted Orion's motion for summary judgment, reasoning that Orion and its predecessors-in-interest were entitled to rely on the resumption exception to maintain their claims because Interior's regulations allowed for such a resumption privilege when Orion resumed annual assessment work in 1970. *Orion Reserves Ltd. P'ship v. Norton*, No. 04-0791, slip op. at 8–12 (D.D.C. 2006) (*Norton*).[2]

On June 28, 2007, the district court took up the question whether Interior unreasonably delayed action on Orion's patent applications. *Orion Reserves Ltd. P'ship v. Kempthorne*, 516 F. Supp. 2d 8 (D.D.C. 2007) (*Kempthorne*). The court concluded that "the delay in processing Orion's patent applications ha[d] not been unreasonable," especially given several administrative and congressional moratoria on claim

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[2] The court also held that Orion had waived its argument that the IBLA's decision to invalidate the oil shale claims was barred by the statute of limitations in 28 U.S.C. § 2462 (2000), because it had failed to make this argument to the agency. *Norton*, slip op. at 6-7.

processing, the unusually large size of the land at issue, limited BLM resources, and the complex legal issues involved. *Id.* at 14–15. The court remanded the proceedings to Interior for further action, but ordered the BLM to file quarterly reports detailing progress made in processing Orion's patent applications. *Id.* at 16–17.

Interior filed a timely notice of appeal and challenges the district court's conclusion that Orion's repeated and extended failure to perform annual assessment work did not forfeit its oil shale claims. Orion cross-appeals, arguing that Interior unreasonably delayed processing its patent applications. Orion has also lodged a "conditional cross-appeal" asking this court to consider several alternative grounds for affirmance in the event we conclude that the district court's decision on the merits was in error. *See Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 649 (D.C. Cir. 1998) (recognizing this circuit's willingness to entertain an otherwise prevailing party's conditional cross-appeal seeking affirmance on alternative grounds).

We have jurisdiction under 28 U.S.C. § 1291 and review the summary judgment decision de novo. *See Stolt-Nielsen Transp. Group Ltd. v. United States*, 534 F.3d 728, 732 (D.C. Cir. 2008). Upon concluding that the district court's decision on the merits was in error, we take up and find wanting each of Orion's alternative arguments. We need not reach Orion's unreasonable delay claim because we conclude that Orion's mining claims are no longer valid and therefore no longer need patent processing.

II.

The IBLA's determination that Orion had forfeited its oil shale mining claims, and the district court's conclusion that it had not, turn on undisputed but different facts. The district court focused on the ultimate resumption of annual assessment work for each of the claims; the IBLA based its decision on the lengthy cessation of required assessment work over the course of several decades. The district court found the IBLA's decision arbitrary and capricious because Orion's predecessors resumed annual assessment work in 1970, at a time when Interior's regulations "allowed for noncompliant claimants to remedy assessment work performance failures by resuming work." *Norton*, slip op. at 8. It was not until 1993 that Interior removed from its regulations any reference to the resumption exception and announced that a lapse in assessment work "causes the interest of the claimant(s) in the minerals subject to the mining laws to revert back to the public domain." 43 C.F.R. § 3851.3(b) (1993). The district court concluded that, by effectively disavowing the longstanding resumption exception, Interior's 1993 regulatory revision was a "change[] to the law" that could only work prospectively and could not reach back to undermine mining claims for which Orion's predecessors had resumed work in 1970. *Norton*, slip op. at 11. Interior's application of this revised regulation to invalidate Orion's claims was therefore "impermissibly retroactive." *Id.* Consistent with Interior's original regulations, the court suggested that Orion should get the benefit of the Leasing Act's savings clause, which preserved the legal status quo for claims first made under the Mining Law. *See id.*

at 9–10. According to this analysis, resumption of assessment work prior to any competing claim was sufficient to maintain Orion's oil shale claims.

The IBLA, by contrast, focused on the long cessation of annual assessment work. In doing so, it applied Mining Law and Leasing Act provisions, as interpreted by the Supreme Court in *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970), to Orion's oil shale claims. *See Crippled Horse II*, 161 I.B.L.A. at 272-74. The *Hickel* Court emphasized that the Leasing Act "completely changed" the legal terrain regarding oil shale lands. 400 U.S. at 51. The Act put an end to private location of oil shale mining claims. As a result, claimants no longer feared other parties' seeking to displace their idle claims; meaningful enforcement of the assessment work requirement could no longer depend on "the private initiative of relocators." *Id.* at 56. Although the Leasing Act's savings clause provides that individuals may preserve Mining Law claims "thereafter maintained in compliance with the laws under which initiated," 30 U.S.C. § 193, the Court did not read the clause merely to preserve the status quo for Mining Law claims as against competing claims. Recognizing that unless Interior could directly challenge lapsed Mining Law claims, "the 'maintenance' provision of [the Leasing Act's savings clause] becomes largely illusory," the Court held that the power of enforcement had shifted to the federal government. *Hickel*, 400 U.S. at 56–57.

In the context of this new government leasing regime, the *Hickel* Court concluded that to preserve a Mining Law claim, a claimant must substantially comply with the assessment work requirement. *See*

id. at 56–57. The Court held that "token assessment work or assessment work that does not substantially satisfy" the Mining Law's annual work requirement "is not adequate to 'maintain' the claims" under the Leasing Act's savings clause. *Id.* at 57. To allow claimants to keep their claims despite long lapses in assessment work would "defeat the policy that made the United States, as the prospective recipient of royalties, a beneficiary of these oil shale claims." *Id.*

Hickel's "substantial compliance" standard governs Orion's sustained failure to complete the required annual assessment work. Applying this standard, the IBLA properly concluded that Orion's decades-long lapse in performing assessment work did not substantially satisfy the statutory work requirement, regardless of its ultimate resumption of annual work. *See Crippled Horse II*, 161 I.B.L.A. at 277; *see also Exxon Mobil Corp. v. Norton*, 346 F.3d 1244, 1252 (10th Cir. 2003) (upholding a finding that gaps in assessment work throughout much of the period between 1929 and 1974 indicated a lack of substantial compliance with annual work requirements); *Cliffs Synfuel Corp. v. Norton*, 291 F.3d 1250, 1261 (10th Cir. 2002) (concluding that there was a clear lack of substantial compliance when assessment work was not performed between 1930 and 1977).

The district court's contrary conclusion is wrong because it missed the effect of *Hickel*. The court erroneously applied Interior's original regulations to Orion's claims even though those regulations are inconsistent with the statutory

requirements as explained in *Hickel*.[3] The authority to issue regulations is not the power to make law, and a regulation contrary to a statute is void. *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936) ("A regulation which . . . operates to create a rule out of harmony with the statute is a mere nullity."). Because the Supreme Court determined that the Mining Law and the Leasing Act together require "substantial compliance" with assessment work obligations to maintain oil shale claims, any contrary directive in Interior's past regulations offers no protection to a noncompliant claimholder like Orion.

The district court also mistakenly held that Interior violated principles of retroactivity when it attempted "to invalidate [Orion's] claims for lapses in assessment work that occurred before either the amended regulation or the *Hickel* decision came into existence." *Norton*, slip op. at 8. It is true that, as a general rule, regulations may only be applied prospectively, but the IBLA relied on *Hickel* and not on any of Interior's regulations. *See Crippled Horse II*, 161 I.B.L.A. at 273–74. Supreme Court decisions are given retroactive effect absent a clear statement from the Court to the contrary. *See Harper v. Va.*

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[3] In order to make its policies "consistent with the law" as interpreted in *Hickel*, 37 Fed. Reg. 17,836 (1972), Interior promulgated regulations in 1972 specifying that failure to perform annual assessment work would render a mining claim "subject to cancellation" by the government, 43 C.F.R. § 3851.3(a) (1972). In 1993 Interior further revised its regulations to remove any reference to the resumption exception and to clarify that a lapse in assessment work "causes the interest of the claimant(s) in the minerals subject to the mining laws to revert back to the public domain." 43 C.F.R. § 3851.3(b) (1993).

Dep't of Taxation, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect . . . as to all events, regardless of whether such events predate or postdate our announcement of the rule."). There is no suggestion in *Hickel* that the decision would have anything other than retroactive effect.[4] The IBLA properly applied *Hickel*'s "substantial compliance" standard to invalidate Orion's oil shale mining claims.

III.

As part of its conditional cross-appeal, Orion offers several alternative reasons why we should affirm the district court's grant of summary judgment. These include three separate arguments that the IBLA decision was arbitrary and capricious or unsupported by substantial evidence. *See* 5 U.S.C. § 706(2) (2006). "'The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency.'" *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 753 (D.C. Cir. 2007) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). We uphold the IBLA's determinations so long as the Board "engaged in reasoned decisionmaking and its decision is adequately explained and supported by the record." *N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1181 (D.C. Cir. 2004) (internal

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[4] Indeed, the Court indicated in its remand order that the "substantial compliance" test applied to claims for which assessment work had lapsed in the early 1930s, long before the Court's decision. *See Hickel*, 400 U.S. at 58.

quotation marks omitted). Likewise, because substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Palace Sports & Entm't, Inc. v. NLRB*, 411 F.3d 212, 220 (D.C. Cir. 2005) (internal quotation marks omitted), we reverse an agency's decision "only when the record is so compelling that no reasonable factfinder could fail to find to the contrary," *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007) (internal quotation marks omitted).

A.

Rather than contest Interior's evidence that it failed for many years to perform annual assessment work, Orion argues that its resumption of work in 1970 was sufficient to maintain its oil shale claims, notwithstanding *Hickel*. But Orion misreads *Hickel*, which made clear that the Mining Law's resumption exception—the linchpin of Orion's argument—did not survive the Leasing Act.

Citing to language from two early Supreme Court cases that applied the maintenance provision of the Leasing Act's savings clause, Orion argues that the resumption exception remains in force. In *Wilbur v. Krushnic*, 280 U.S. 306 (1930), the Supreme Court suggested that a lapse in assessment work does not automatically forfeit a Mining Law claim, but only renders it subject to loss by relocation. *Id.* at 317. Noting that the claimant had only failed to perform assessment work for a single year and had fully resumed work before anyone contested its claim, the Court concluded that "no relocation can be made if work be resumed after

default and before such relocation." *Id.* Similarly, in *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639 (1935), the Court rejected Interior's attempt to invalidate mining claims during a fourteen-month lapse in assessment work. Noting that the claimant had not only stated its intention to resume work but also made arrangements to do so, the Court concluded that the temporary work failure "gave the government no ground of forfeiture." *Id.* at 646.

As noted above, the *Hickel* Court reexamined the annual assessment work requirement in the context of the new leasing regime, concluding that the Leasing Act "makes the United States the beneficiary of all claims invalid for lack of assessment work." *Hickel*, 400 U.S. at 57. Because *Hickel* involved mining claims that Interior had cancelled for lack of assessment work rather than lapsed claims for which a claimant had resumed work, *id.* at 50, the Court did not have occasion to address the Mining Law's resumption right with any specificity. Nevertheless, the Court's holding makes clear that, regardless of whether assessment work has resumed, the only relevant inquiry concerns the actual work performed:

> [W]e now hold that token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28, is not adequate to "maintain" the claims within the meaning of [the savings clause] of the Leasing Act.

Id. at 57. In practice, the Court noted, this means "compliance with 'everything' under 30 U.S.C. § 28,

which taken literally would mean assessment work of $100 'during each year.'" *Id.* at 56. Although the Court suggested that not "every default in assessment work," however minimal or excusable, will automatically "cause the claim to be lost," it concluded that successful claimants must show "substantial compliance" with the annual requirement. *Id.* at 57.

The Mining Law's resumption exception was thus replaced by *Hickel*'s "substantial compliance" test, and Orion's reliance on prior cases suggesting a resumption right that survived the Leasing Act is misplaced. Although the *Hickel* Court did not explicitly overrule *Krushnic* and *Virginia-Colorado*, it concluded that those cases reflect "a judicial attitude of fair treatment for claimants who have substantially completed the assessment work required." *Id.* at 52. Significantly, the Court characterized all statements from those prior cases in conflict with the discussion and holding in *Hickel* as "dicta." *Id.* at 57. *Krushnic* and *Virginia-Colorado* are best understood to signify no more than that a minor or brief default in assessment work does not necessarily "cause the claim to be lost." *Id.*

The IBLA was therefore correct to base its decision upon "the quantum of the actual assessment work performed and the length of time the claimant failed to meet the annual assessment work required by the Mining Act," *Crippled Horse II*, 161 I.B.L.A. at 274 (quoting *Cliffs Synfuel*, 291 F.3d at 1259). That Orion resumed assessment work before Interior moved to invalidate its claims is not, on the facts of this case, even relevant. Given evidence of Orion's decades-long noncompliance with the annual work

requirement, the IBLA had good reason to invalidate its oil shale claims under *Hickel*'s "substantial compliance" test.

B.

Orion also contends that the IBLA erred in failing to consider its *intent* to maintain the 156 oil shale claims at issue. We disagree. *Hickel* made a showing of intent irrelevant when a claimant has substantially failed to perform required assessment work. *See* 400 U.S. at 57. In an effort to avoid the force of *Hickel*, Orion makes much of a subsequent case, *United States v. Locke*, 471 U.S. 84 (1985), which addressed a different statute and a different issue. In the course of distinguishing an annual filing deadline in the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1744 (2000), from the Mining Law's assessment work requirement, the *Locke* Court suggested that

> it was open to the Court to conclude in *Hickel* that Congress had intended to make the assessment work requirement merely an indicium of a claimant's specific intent to retain a claim. Full compliance with the assessment work requirements would establish conclusively an intent to keep the claim, but less than full compliance would not by force of law operate to deprive the claimant of his claim. Instead, less than full compliance would subject the mine owner to a case-by case determination of whether he nonetheless intended to keep his claim.

Locke, 471 U.S. at 101–02. The thrust of *Hickel*'s holding was not altered by *Locke*, which merely

rejected a lower court's reliance on *Hickel* in finding that a December 31 filing had "substantially complied" with the FLPMA requirement to file "on or before December 30." *Id.* at 100. The *Locke* Court emphasized that "[f]ailure to comply fully with the physical requirement that a certain amount of work be performed each year is significantly different from the complete failure to file on time documents that federal law commands be filed." *Id.* at 101. The Court noted that although the mining laws at issue in *Hickel* "do not clearly provide that a claim will be lost for failure to meet the assessment work requirements," *id.*, thus leaving open the possibility of an "intent" standard for invalidation, the FLPMA "explicitly provides that failure to comply with the applicable filing requirements leads automatically to loss of the claim," *id.* at 102. Rather than offering an authoritative interpretation of *Hickel*, the Court was simply rejecting an argument that the FLPMA filing deadline is susceptible to an intent analysis. *Locke* did not disturb the substantial compliance inquiry. Indeed, the Court specifically noted that only "if an individual complied substantially but not fully with the requirement" might he "under some circumstances be able to retain possession of his claim." *Id.* at 101. In the absence of substantial compliance, intent (or any other factor) is irrelevant.

Orion's claims are invalid because its predecessors did not substantially comply with the annual assessment work requirement. Unlike the brief, fourteen-month pause in assessment work that led the *Virginia-Colorado* Court to consider the claimant's stated intention and preparations to resume work, 295 U.S. at 643, the decades-long absence of required annual improvements to Orion's

mining claims did not "substantially satisfy" the statutory work requirements, *Hickel*, 400 U.S. at 57. When a claimant has not substantially satisfied the annual assessment work requirement, his intent is immaterial.

C.

Orion also argues that the IBLA improperly inferred from missing annual assessment work affidavits that Orion did not perform required work during those years. But Orion has failed to produce any evidence that assessment work in fact took place in years when no affidavits were filed. In order to maintain its mining rights, a claimant must comply with applicable federal, state, and local requirements. *See* 30 U.S.C. § 26. Utah law, to which Orion's claims are subject because they are located in Utah, requires that a claimowner who has performed assessment work must, within thirty days, file an affidavit stating "that the annual assessment work required to maintain the claim was performed." UTAH CODE ANN. § 40-1-6(2)(c) (2008). Although the Utah Supreme Court held that failure to file a required affidavit does not result in loss of a mining claim when there is other compelling evidence that the assessment work had in fact been performed, *Murray Hill Mining & Milling Co. v. Havenor*, 66 P. 762, 765 (Utah 1901), the statutorily required affidavit is considered "prima facie evidence of the facts stated in the affidavit," UTAH CODE ANN. § 40-1-6(3).

It was therefore reasonable for the IBLA to conclude that the absence of affidavits made out "a prima facie case that none were filed because the

work was not performed," *Crippled Horse II*, 161 I.B.L.A. at 274. This approach is consistent with longstanding department practice. *See, e.g.*, *United States v. Haskins*, 59 I.B.L.A. 1, 102 (1981) (concluding that a lack of assessment work records "established a prima facie case that the work had not been performed"). That Orion filed affidavits for some years, but not others, strengthens the inference that assessment work was recorded when it was in fact performed.

To be sure, failure to file affidavits does not conclusively demonstrate a failure to conduct assessment work, and the IBLA considered the absence of affidavits to be nothing more than prima facie evidence, shifting the burden to Orion "to produce countervailing evidence of assessment work performed." *Crippled Horse II*, 161 I.B.L.A. at 275. Orion had ample opportunity to produce evidence of work, but it failed to do so before the IBLA, in the district court, and on appeal. We determine that the IBLA's conclusion that Orion did not substantially comply with the assessment work requirement was supported by substantial evidence.

IV.

In its motion for summary judgment, Orion argued that Interior was barred from invalidating its claims by 28 U.S.C. § 2462, which provides that a "proceeding for the enforcement of any civil . . . forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ." The district court correctly concluded that because Orion failed to raise this statute of limitations defense

during the administrative proceedings, it had waived this argument. *Norton*, slip op. at 6–7; *see also Salt Lake Cmty. Action Program v. Shalala*, 11 F.3d 1084, 1087 (D.C. Cir. 1993) (identifying "the well-settled premise that objections to agency proceedings must be presented to the agency 'in order to raise issues reviewable by the courts'" (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952))).

Orion now seeks to excuse its failure to raise this defense before the IBLA by suggesting that the BLM decision was based on Utah (rather than federal) law. In reality, the BLM decision was grounded in federal law. The decision identified relevant provisions of the Mining Law and the Leasing Act, discussed applicable federal regulations, and cited the Supreme Court's decision in *Hickel* as the legal basis for Interior's invalidation of the oil shale claims. *See Crippled Horse I*, slip op. at 1–2. Orion's excuse therefore fails, and its statute of limitations argument was forfeited.

V.

Finally, Orion argues that Interior's failure to provide notice and a hearing prior to invalidating its oil shale claims violated Orion's right to due process. According to Orion, the BLM should have afforded it the opportunity to respond with documentation as part of an administrative contest proceeding, and the IBLA should have held an evidentiary hearing before invalidating Orion's mining claims. Interior argues that it followed longstanding department policy and practice in concluding, with respect to Orion's claims, that "no contest pursuant to 43 C.F.R.

4.451-1 or hearing pursuant to 43 C.F.R. 4.415 is necessary where the material facts are undisputed." *Crippled Horse II*, 161 I.B.L.A. at 277; *see also Woods Petroleum Co.*, 86 I.B.L.A. 46, 55 (1985) (concluding that the department need only grant a hearing "when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them" (quoting *Stickelman v. United States*, 563 F.2d 413, 417 (9th Cir. 1977))). We give "substantial deference" to an agency's interpretation of its own regulations, "only setting it aside if the plain language of the regulation or 'other indications of the [agency's] intent' require another interpretation." *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1080–81 (D.C. Cir. 2007) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

It is the IBLA's decision and not the BLM's initial action that binds the agency and formally extinguished Orion's mining claims. *See Nat'l Wildlife Fed'n*, 145 I.B.L.A. 348, 362 (1998) (noting that the IBLA is "delegated responsibility to decide for the Department 'as fully and finally as might the Secretary' appeals regarding use and disposition of the public lands and their resources" (quoting 43 C.F.R. § 4.1 (2005))); *see also Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 n.5 (10th Cir. 2004) ("The IBLA issues the DOI's final and binding decision, not the BLM."). The IBLA reviewed the BLM's determination de novo. Although the IBLA had discretionary authority to grant an evidentiary hearing, *see* 43 C.F.R. § 4.415, Orion failed to request one, and there is no indication that Orion was foreclosed in any way from

submitting documents or other evidence in its defense during the IBLA proceedings. *See Timothy J. Bottoms*, 150 I.B.L.A. 200, 216 (1999) (finding that due process was "satisfied without an administrative hearing" when the claimant had adequate "opportunities to submit documentary and other evidence to BLM and this Board").

Orion has also failed to identify any evidence that created a dispute as to material fact requiring resolution through a formal evidentiary hearing. *See KernCo Drilling Co.*, 71 I.B.L.A. 53, 56 (1983) ("A hearing is necessary only where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. In the absence of such an issue, no hearing is required.").[5] Although Orion advanced arguments about the proper inferences that may be drawn from an absence of work affidavits, it failed to introduce any evidence suggesting that assessment work was actually performed in years when no affidavit was filed. Without a factual conflict, the IBLA had no reason to grant Orion an evidentiary hearing. *See Woods Petroleum*, 86 I.B.L.A. at 55 (refusing to grant a hearing when "the dispute did not involve facts, but involve[d] the proper application and interpretation of those facts"); *see also Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam)

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[5] The IBLA's interpretation of when an evidentiary hearing is required is consistent with the regulatory text, 43 C.F.R. § 4.415, and accords with other department determinations of what due process requires in similar circumstances, *see, e.g., Taylor Energy Co. Phillips Petroleum*, 148 I.B.L.A. 286, 295 (1999) (finding that IBLA appeal proceedings satisfied due process in circumstances when "the record does not reflect sufficient factual issues to warrant a hearing").

(holding that if a hearing "mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute"); *Conoco Inc. v. FERC*, 90 F.3d 536, 543 n.15 (D.C. Cir. 1996) (concluding that the APA requires agencies "to hold hearings only when the disputed issues may not be resolved through an examination of written submissions" (quoting *Envtl. Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993))). Given Orion's failure to identify any meaningful factual dispute, the agency proceedings provided sufficient process and Orion's due process challenge to the IBLA decision fails.

VI.

For the foregoing reasons, the judgment of the district court is

Reversed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORION RESERVES LIMITED PARTNERSHIP,	)	
Plaintiff,	)	
v.	)	Civil Action No. 04-791 (RCL)
DIRK KEMPTHORNE, *et al*,	)	
Defendants.	)	

MEMORANDUM & ORDER

I. INTRODUCTION

This matter comes before the Court on plaintiff's Memorandum [43] Respecting Remedy filed on behalf of Orion Reserves Limited Partnership ("Orion"). Previously, this Court granted plaintiff's Motion [26] for Summary Judgment and denied defendants' Cross Motion [27-1] for Summary Judgment. In addition, this Court ordered the parties to file memoranda respecting what relief, if any, the Court should award. For the reasons set forth below, this Court GRANTS IN PART and DENIES IN PART plaintiff's Request [43] Respecting Remedy.

II. BACKGROUND

In 1988, Orion's predecessor in interest, Frederick H. Larson, filed a patent application for 156 oil shale mining claims totaling 23,371 acres. (Defs.' Mem. in Opp'n at 7.) The following year, Larson amended the original patent application by dividing it into nine separate patent applications. (Pl.'s Mem. Respecting Remedy at 2.) Defendants, however, did not process the applications for two years because of an administrative moratorium on the processing of oil shale mining patents. (*Id.* at 4.)

On account of the moratorium, Larson filed suit against the Department of the Interior ("Department") in the U.S. District Court for the District of Utah to compel the Department to process his patent applications in 1991. (*Id.*) Subsequently, defendants rescinded the moratorium after the 10th Circuit declared that the moratorium violated the mining laws. (*Id.* at 5.) Following the revocation of the administrative moratorium, however, Congress placed a funding moratorium on the processing of all oil shale mining claims until after October 1, 1992. (*Id.*) Larson then amended his complaint to challenge this new moratorium. (*Id.*) Defendants moved to dismiss, but the court found that even with the funding prohibition in place, defendants had to process Orion's applications. (*Id.*) The Department then began to process the applications and issued First Half Final Certificates for all nine of Orion's applications in the fall of 1992. (*Id.* At 6.) Consequently, the court dismissed the case as moot in 1993. (*Id.* at 7.)

In 1994, Larson transferred his 156 claims to Crippled Horse Investments Limited Partnership ("Crippled Horse"). (Defs.' Mem. in Opp'n at 12.) On September 23, 1996, defendants had yet to complete processing the applications, and Crippled Horse commenced a second action against the Department and the Bureau of Land Management ("BLM") alleging unreasonable delay in the Department's processing of its patent applications. (Pl.'s Mem. Respecting Remedy at 14.) This suit was later stayed on the condition that BLM would file a status report every sixty days regarding its progress in processing the applications. (*Id.* at 17.)

In 1997, defendants filed a contest complaint against Application UTU-66593, which contained two of Orion's 156 claims. (Pl.'s Mem. Respecting Remedy at 14.) Defendants' contest complaint argued that the claims were invalid for lack of discovery and failure to meet the statutory work assessment requirements. (*Id.*) To litigate all challenges in a single contest hearing, plaintiff asked BLM to defer the contest complaint against the claims in Application UTU-66593 until BLM made contest complaints against Orion's remaining claims. (*Id.* at 15.) BLM then declared a number of the claims in Application UTU 6324 "null and void" for nonperformance of assessment work in 1931. (*Id.* at 16.) However, at the request of Orion, BLM rescinded its decision pertaining to Application UTU 6324 and agreed to stay the contest proceeding pertaining to UTU-65593 until BLM could issue contest complaints, if necessary, against all of claims. (Defs.' Mem. in Opp'n at 13.)

In 1999, BLM stopped work on the mineral reports for Orion's claims and began a search of the local Uintah County records for work assessment affidavits concerning Orion's claims. (*Id.* at 14.) At the time work ceased on the reports, one report had been completed and submitted for technical review, one report had been completed and contested by BLM, two reports had been drafted, but had not yet undergone technical review, and the five remaining reports had been started. (*See Id.* at 15-16.) During the county records search, BLM discovered that all 156 claims lacked work assessment affidavits for periods of fifteen to thirty-five years between 1932 and 1970. (*Id.* at 16.) As a result, BLM declared on September 2, 1999 that all 156 of Orion's claims were void for failing to comply with the work assessment requirements of the Mining Law of 1872.[6] (Pl.'s Mem. Respecting Remedy at 24.)

Orion appealed this decision to the IBLA on October 4, 1999. (Defs.' Mem. in Opp'n at 16.) On May 10, 2004, four and a half years later, the IBLA affirmed BLM's decision. (*Id.*) Orion then filed a complaint in this Court challenging the IBLA's decision. (*Id.*) This Court granted Orion's motion for summary judgment on March 31, 2006 and ordered the parties to supplement the record as to what relief, if any, the Court should award. (Pl.'s Mem. Respecting Remedy at 28.)

In their memorandum [43], Orion requests the Court to compel defendants to expedite the

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[6] The Mining Law provides that "until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year." 30 U.S.C. § 28 (2006).

processing of Orion's mining applications to remedy an unreasonable delay in the processing of the applications at issue. (*Id.*) Specifically, Orion seeks the Court to compel the defendants to either issue the patents for Orion's mining claims or explain why defendants will not issue the patents within sixty days of this order. (Pl.'s Proposed Order at 1.) Additionally, Orion requests this Court to retain jurisdiction over the matter if defendants fail to act within sixty days.[7] (Pl's Mem. Respecting Remedy. at 2.) In their opposition [46], defendants argue that the matter should be remanded to BLM for agency processing without judicial intervention. (Def.'s Mem. in Opp'n at 18.)

III. ANALYSIS

The Administrative Procedure Act ("APA") provides that courts, upon reviewing agency action, "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Courts possess the power to review claims of unreasonable delay because "the benefits of agency expertise . . . will never be realized if the agency never takes action." *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) (hereinafter *TRAC*). To constitute an unreasonable delay, the agency must have a "duty to act" which has been

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[7] In Orion's Memorandum [43], Orion asks the Court to adopt Proposed Order [45]. Orion abandons this requested relief in Orion's Reply [47] and proposes a new order respecting remedy. However, in Orion's Response to defendants' Sur-Reply [55], Orion abandons the relief requested in their reply [47], and asks the Court to order the original relief it requested in Proposed Order [45]. (Pl.'s Resp. to Sur-Reply at 10.)

unreasonably delayed in the agency's execution of that duty. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004). Moreover, for an unreasonable delay to warrant a court to order agency action with a specific time frame, the unreasonable delay must be "egregious." *TRAC*, 750 F.2d at 79. As a result, courts rarely compel an agency to render an immediate decision on an issue. *See In re Barr Labs Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) (finding that courts only compel agency action in "exceptionally rare cases"). Rather, courts allow agencies to set their own priorities on account of their "unique—and authoritative—position" to "allocate [their] resources in the optimal way." *Id.*

Accordingly, to determine whether an agency action has been unreasonably delayed, the Court must examine the following factors:

> First, "the court should ascertain the length of time that has elapsed since the agency came under a duty to act," . . . Second, "the reasonableness of the delay must be judged 'in the context of the statute' which authorizes the agency's action. . . . Third, the court must examine the consequences of the agency's delay. . . . Finally, the court should give due consideration in the balance to "any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources."

In re Int'l Chem. Workers Union, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (internal citations omitted).

Upon a finding of unreasonable delay, a court will grant appropriate equitable relief to remedy the delay. *See Cobell v. Norton*, 240 F.3d 1081, 1108 (2001) (upholding a district court's specific relief after finding unreasonable agency delay). However, a court has the power to grant equitable relief even absent a finding of unreasonable delay. *See Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003) (stating that even if a district court does not find unreasonable delay, it may retain jurisdiction to ensure that the agency proceeds with diligence).

A. Duty to Act

Administrative agencies cannot decide which duties to perform and which duties to ignore, rather they must perform the duties which Congress intends them to perform. *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991). Here, the Department and BLM have a Congressional duty to process oil shale mine patent applications. *See id.* (stating that Congress intends the Department of the Interior and BLM to process oil shale mining patent applications). Upon invalidating a claim, defendants' Congressional duty to process the applications ceases. *Cf. Cameron v. United States*, 252 U.S. 450, 460 (1920) (explaining that the Secretary of the Interior has a duty to recognize valid claims and eliminate invalid claims).

Due to administrative and Congressional moratoria, defendants' duty to process Orion's

applications did not arise until after a court ruling in 1992 which ordered defendants to perform their duty and process Orion's applications. (Pl.'s Mem. Respecting Remedy at 2, 5.) Defendants then performed their duty until all claims were declared void in 1999. (*See generally id.* at 5-25.) BLM's voidance of the claims completed its processing of Orion's applications and ended its expenditure of additional resources on processing Orion's applications. (Defs.' Sur-Reply at 3.) Accordingly, the Court finds that defendants' initial duty to process Orion's applications ended in 1999 when defendants voided Orion's claims for lack of assessment work performed on the claims for various periods between 1932 and 1970. *See Cameron*, 252 U.S. at 460 (stating that the Department of the Interior eliminates all invalid claims).

Defendants' duty to process Orion's applications resumed, however, following this Court's March 31, 2006 Opinion in which the Court found that defendants' challenges to Orion's claims for lack of work assessment failed as arbitrary and capricious. (Mem. Op. at 11.) Accordingly, the Court finds that defendants' duty to process Orion's applications consists of two separate periods, one period spans from 1992 until the claims were voided in 1999 and the other spans from the March 31, 2006 opinion to the present.

B. Reasonableness of the Delay

The reasonableness of defendants' delay can only be measured during the periods in which defendants had a duty to act. As the Court explained above, defendants had a duty to process Orion's

applications from 1992 until 1999, and that duty resumed following the Court's March 31, 2006 opinion. Any delay between 1999 and 2006, however, cannot be deemed unreasonable because defendants did not have a duty to process Orion's applications and could not legally issue Orion's patents. *See Independence Mining Co. v. Babbitt*, 105 F.3d 502, 508 (9th Cir. 1997) (explaining that a claimant has no rights to a patent if the Secretary of the Interior challenges the validity of the patent during the application process). Accordingly, the Court will now determine the reasonableness of defendants' delay for both periods in which defendants had a duty to act. The Court will examine the reasonableness of the delay within the context of the statute, consider any practical difficulties involved with processing Orion's applications, and determine the consequences, if any, caused by the delay. *In re Int'l Chem. Workers Union*, 958 F.2d at 1149.

1. Within the Context of the Statute

Congress has authorized the defendants to process oil shale mine patents. *Marathon Oil Co.*, 937 F.2d at 500. As part of this process, Congress instructs the defendants to challenge claims which may be invalid to avoid issuing mining patents to invalid claims.[8] If, during the application process,

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[8] In the Mining Law, Congress declared that a patent applicant must complete annual work assessment to prevent the claim from being "open to relocation." 30 U.S.C. § 28 (2007). To ensure that the annual assessment work has been completed and that the claims are not open, BLM conducts a courthouse records search during the processing of patent applications to locate records demonstrating that the requirement has been satisfied.

defendants invalidate a claim, the applicant has no right to that claim. *See United States v. Locke*, 471 U.S. 84, 105 (1985) ("[N]o right arises from an invalid claim of any kind.").

Due to both a Congressional and an administrative moratorium that prohibited defendants from processing applications for oil shale mining patents, defendants did not begin to process Orion's applications until a court ordered them to do so in 1992. (*See* Pl.'s Mem. Respecting Remedy at 3, 5-6.) Following that decision, defendants fulfilled their duty and processed Orion's applications as required by Congress. (*See generally id.* at 7-25.) Concerned that a decision had not yet been made, Orion filed a lawsuit in 1996 to compel defendants to expedite the processing of Orion's applications. (*Id.* at 14.) This matter was resolved when the parties agreed to stay further proceedings provided that defendants provide progress reports to Orion every sixty days to prevent further delays. (*Id.* at 17.) Orion did not contest the delays any further. In 1999, defendants voided all 156 of Orion's claims. (*Id.* at 24.) Accordingly, the Court finds that defendants processed Orion's applications as required by statute without unreasonable delay from 1992 until the applications were voided in 1999.

Once defendants determined that Orion's claims were invalid, defendants' duty within the context of the statute ceased, and defendants could not legally issue Orion's patents until after the Court's March 31, 2006 opinion. *See Independence Mining Co.*, 105 F.3d at 508 (explaining that a patent applicant has no rights to a challenged

claim). Therefore, the delay from 1999 until 2006 cannot be considered unreasonable.

Following the Court's March 31, 2006 opinion, defendants' statutory duty to process Orion's applications resumed. To date, however, any delay in the application process has yet to reach the point of being unreasonable and "egregious." *TRAC*, 750 F.2d at 79. Accordingly, the Court finds that any delay to date has not been unreasonable within the context of the statute. Further substantial delay, however, may reach the point of being egregious. Therefore, defendants must now complete the processing on the remaining eight applications within a reasonable period of time. *See MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (stating that a reasonable time for agency action "encompass[es] months, occasionally a year or two, but not several years or a decade").

2. Practical Difficulties and Limited Resources

When confronted with practical difficulties in executing a task and the need to prioritize limited resources, administrative agencies are in the best position to allocate their resources to complete the task in a timely manner. *See In re Barr Labs*, 930 F.2d at 76. In the present matter, defendants have faced practical difficulty in processing Orion's applications results from the difficulty of processing Orion's applications, which total over 23,000 acres, and the need to prioritize defendants' limited resources. (Defs.' Mem. in Opp'n at 24.)

To determine the validity of Orion's claims, defendants must undertake a two step process consisting of a field examination of the site and the preparation of mineral report. (*Id.* At 4.) The time to complete both tasks hinges upon the size of the claim and available resources. (*Id.*) Because Orion's claims were so large[9] and defendants had limited resources,[10] the processing of the applications from 1992 until 1999 took much longer than defendants anticipated, and any delay during that period was not unreasonable. (*See* Pl.'s Mem. Respecting Remedy at 7.)

In fact, the task of processing Orion's applications was so large that, defendants had not yet finalized all nine mineral reports when they voided Orion's claims on January 15, 1999 for failing to meet the necessary work assessment requirements. (*Id.* at 16.) The field work for all nine claims was complete, but only one mineral report had undergone technical review. (*Id.* At 16.) Of the remaining eight reports, one was completed and contested by BLM, two reports had been drafted, and five had been started. (*Id.* at 16.) Accordingly, the remaining reports need to be finalized and submitted for technical review before defendants can issue a

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[9] In their opposition, defendants state that only 2% of patent applications received in the past 25 years have consisted of more than 2,600 acres. (Defs.' Mem. in Opp'n at 24.)

[10] In light of the limited resources of defendants, Congress enacted legislation which allowed patent applicants, such as Orion, to fund a third-party contractor to conduct field examination and prepare mineral reports. Interior and Related Agencies Appropriations Act for the fiscal year ending September 30, 1996, Pub. L. No. 104-134, 110 Stat.1321 (Apr. 26, 1996). Orion did not avail itself to this opportunity.

final decision on Orion's claims. *See Independence Mining Co.*, 105 F.3d at 508 ("The Secretary [of the Interior] has no . . . duty to issue a patent prior to validity determination."). Specifically, defendants must submit the two reports with finished mineral reports for technical review and finalize and submit the five remaining reports for technical review. (Sokolosky Decl. ¶ 7.) In addition, the applications must be reviewed by and acknowledged by the BLM director. (Defs.' Mem. In Opp'n at 26.)

Moreover, despite knowing that most of the applications were incomplete, Orion believed that the lack of assessment work was the only reason for the voidance of all nine claims and that defendants had no other grounds to void the claims.[11] This belief was based upon Orion's interpretation of defendants' statements that BLM had completed processing Orion's applications and would not assert additional grounds to invalidate Orion's claims. (Pl.'s Reply to Defs.' Opp'n at 2.) In refuting Orion's interpretation, defendants contend that the statements meant that defendants completed processing Orion's applications when they were declared void. (Defs.' Sur-Reply at 3.) Moreover, defendants were not going to spend additional resources to process and raise challenges against void applications. (*Id.*)

The Court finds defendants' interpretation more reasonable because defendants had been submitting progress reports to Orion which detailed the progress of the nine applications. (*See* Pl.'s Mem.

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[11] Orion argues that 10th Circuit precedent requires an agency to bring all challenges to an oil shale patent application in a single contest proceeding. Orion fails to provide a citation for this precedent.

Respecting Remedy at 18-25.) Orion knew that defendants had not completed the reports for all nine claims. Consequently, defendants could not have challenged all deficiencies in Orion's claims. Moreover, defendants had previously issued contest complaints against two of Orion's claims in 1997. (*Id.* at 14.) Therefore, it was not unreasonable to believe that defendants may challenge other deficiencies in Orion's unfinished applications.

Defendants have had practical difficulties in processing Orion's patent applications because the applications cover over 23,000 acres of land. Moreover, defendants have had the need to prioritize competing priorities with limited resources. Accordingly, the Court finds that the delay in processing Orion's patent applications has not been unreasonable.

3. Consequences of the Delay

In analyzing the consequences of agency delay, economic harm is more tolerable than harm to human health and welfare. *In re Am. & Idaho Rivers United*, 372 F.3d at 418. Here, Orion only alleges that it has suffered economic harm as a result in the delay in the processing of Orion's applications. (*See* Larson Aff. ¶ 3.) Consequently, this case is distinguishable from other cases in which courts have required agency action to occur within a specific time frame because, in those cases, agency inaction could harm human health and welfare. *See Id.* at 420 (mandating a response within forty-five days because the harm of inaction may result in the possible extinction of a species); *see also In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545,

(D.C. Cir. 1999) (retaining jurisdiction over the matter until the Mine Safety and Health Administration promulgate new standards to protect miners from harmful gaseous emissions); *In re Int'l Chem. Workers Union*, 958 F.2d at 1150 (explaining that the serious health risks associated with cadmium exposure warranted setting a deadline for finalizing new requirements for handling cadmium).

Moreover, any economic harm suffered by Orion is lessened by the fact that a patent is not required to begin mining operations on a claim. *Independence Mining Co.*, 105 F.3d at 509 (citing *Locke*, 471 U.S. at 86). Therefore, while Orion has undoubtedly suffered an economic harm, Orion has not suffered a complete economic loss by not yet receiving a mining patent. Accordingly, the Court finds that the defendants' delay is not unreasonable because it has not adversely affected human health and welfare.

C. Relief

When confronted with the task of awarding appropriate relief, a court has broad equitable powers. *See Cobell*, 240 F.3d at 1108 (explaining that a court has full equitable powers to grant relief unless Congress specifically restricts that power). The breadth of this power allows a court to award such equitable relief as it deems appropriate even without a finding of unreasonable delay. *See Mashpee Wampanoag Tribal Council*, 336 F.3d 1094 at 1102.

Here, the Court finds that defendants' delay has not been unreasonable. Orion, however, has

awaited a final decision on its oil shale mining patent applications for an exceptionally long period of time. Defendants have now been under a new duty to process Orion's applications for a year, and to prevent further and possibly unreasonable delay, defendants must process Orion's remaining applications expeditiously. It has been nearly twenty years since Orion filed its first patent application, and Orion deserves a final decision on whether or not its patents will be issued. Accordingly, this Court, pursuant to its power to grant equitable relief, will retain jurisdiction over this matter until defendants issue a final decision on Orion's applications.

Specifically, this Court will order as follows:

1. Defendants shall provide Orion and the Court with quarterly status reports detailing the progress defendants have made in processing Orion's oil shale mining patent applications. The first report shall be due three months after the date of this Order.

2. Defendants' quarterly reports shall include (1) a detailed description of all significant actions undertaken, (2) staff positions and hours spent processing Orion's applications since the preceding report, and (3) the specific tasks performed by each staff person. The first report shall include all actions

taken since this Court's March 31, 2006 opinion, and a listing of staff positions, time spent processing Orion's applications, and specific tasks performed by each staff person from this date forward. In addition, defendants shall provide a schedule of actions expected to be undertaken during the next three month period.

3. Upon reasonable request by Orion or the Court, defendants shall provide within thirty days any additional information to explain or supplement their quarterly reports.

4. If Orion is unable to obtain additional information from defendants through informal requests, Orion may petition the Court to order defendants to provide such information.

III. CONCLUSION

The Court finds that any delay suffered by Orion has not yet been unreasonable for the following reasons: (1) defendants processed Orion's applications during the two periods in which they had a duty to do so; (2) defendants' delay has not been unreasonable within the context of the statute authorizing their action; (3) any harm caused by the delay was economic, and not harmful to human

health and welfare; and (4) defendants' delay results from practical difficulties due to the large size of Orion's claims and the need to prioritize a competing workload with limited resources.

The Court, however, recognizes that Orion has waited for a final decision on its patent applications for eighteen years. Therefore, to ensure that defendants proceed with diligence, the Court will retain jurisdiction over this matter and will order defendants to submit quarterly status reports to this Court detailing the steps which defendants have taken to complete processing Orion's oil shale mining patent applications.

Accordingly, the Court

ORDERS that plaintiff's Memorandum [43] Respecting Remedy is GRANTED IN PART and DENIED IN PART. Specifically, it is

ORDERED that plaintiff's request for defendants to issue a decision within sixty days is DENIED; it is further

ORDERED that the case is remanded to the Department of the Interior for further proceedings not inconsistent with this Court's March 31, 2006 Order and this Order; it is further

ORDERED that plaintiff's request for the Court to retain jurisdiction over this case until final agency action on all of plaintiff's mineral patents is GRANTED; it is further

ORDERED that defendants shall provide quarterly status reports to Orion and the Court explaining the progress that defendants have made in processing Orion's applications. Defendants' first status report is due three months after the date of this Order; it is further

ORDERED that defendants' quarterly reports shall include (1) a detailed description of all significant actions undertaken, (2) staff positions and hours spent processing Orion's applications since the preceding report, and (3) the specific tasks performed by each staff person. The first report shall include all actions taken since this Court's March 31, 2006 opinion, and a listing of staff positions, time spent processing Orion's applications, and specific tasks performed by each staff person from this date forward. In addition, defendants shall provide a schedule of actions expected to be undertaken during the next three month period; it is further

ORDERED that upon reasonable request by Orion or the Court, defendants shall provide any additional information to explain or supplement their quarterly reports within thirty days of such a request; and it is further

ORDERED that Orion may petition the Court to order defendants to provide such information if Orion is unable to obtain additional information from defendants through informal requests.

SO ORDERED.

Signed by Royce C. Lamberth, United States District Judge, June 28, 2007.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORION RESERVES LIMITED PARTNERSHIP,	)	
Plaintiff,	)	
v.	)	Civil Action No. 04-0791 (RCL)
GALE A NORTON, SECRETARY, U.S. DEPARTMENT of the INTERIOR, et al.	)	
Defendants.	)	

MEMORANDUM OPINION

This case comes before the Court on Plaintiff's Motion [26] for Summary Judgment filed on behalf of Orion Reserves Limited Partnership ("Orion"), and Federal Defendants' Cross Motion [27-1] for Summary Judgment filed on behalf of Gale A. Norton, Secretary of the Department of the Interior ("Interior"), Kathleen Clarke, Director of the Bureau of Land Management ("BLM"), and Sally Wisely, Utah State Director of BLM. Plaintiff filed a Complaint [1] seeking judicial review under the Administrative Procedure Act ("APA") and otherwise of an Interior Board of Land Appeals ("IBLA") decision affirming a declaration by the Utah State

Office BLM that 156 oil shale mining claims owned by plaintiff were abandoned and void for failure to substantially comply with the assessment work requirements of the Mining Law of 1872, 30 U.S.C. § 28 (2000) ("the Mining Law"), and § 37 of the Mineral Leasing Act of 1920, 30 U.S.C. § 193 (2000) ("the Leasing Act").

For the reasons set forth herein, the plaintiff's motion will be granted and defendants' cross-motion will be denied.

I. LEGAL BACKGROUND

A. The Mining Law of 1872

The Mining Law declared all valuable mineral deposits in public lands of the United States open to exploration, occupation, and purchase "according to the local customs or rules of miners in the several mining-districts." 30 U.S.C. § 22 (2006). Mining claims may be maintained indefinitely, as long as the locator complies with federal, state, and local requirements. 30 U.S.C. §§ 26, 28. The Mining Law requires that "until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year." 30 U.S.C. § 28. This annual work requirement is commonly referred to as assessment work. *See* Black's Law Dictionary 125 (8th ed. 2004). Failure to perform yearly assessment work results in the claim being "open[ed] to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." 30 U.S.C. § 28.

B. The Mining Leasing Act of 1920

In 1920, Congress enacted the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et. seq.*, which "completely changed the national policy over the disposition of oil shale lands." *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 51 (1970). The Leasing Act closed oil shale (among other minerals) lands to location and acquisition of title under the Mining Law, but left them open to lease through the Secretary of the Interior. 30 U.S.C. § 241(a). Existing claims, initiated under the Mining Law prior to February 25, 1920, were grandfathered in under the Savings Clause of the Leasing Act, which provided that those claims "thereafter maintained in compliance with the laws under which initiated (the Mining Law) . . . may be perfected under such laws, including discovery." 30 U.S.C. § 193.

II. FACTUAL BACKGROUND

Between 1917 and 1919, plaintiff's predecessors-in-interest located and initiated 156 unpatented oil shale mining claims in Utah, under the Mining Law. (Pl.'s Mot. 1.) In 1988, later predecessor-in-interest Frederick H. Larson ("Larson") filed an application to patent the claims with the Utah BLM.[12] (*Id.*) In 1991, Larson filed suit in the U.S. District Court for the District of Utah to compel the Secretary of the Interior to complete the processing of the patent applications. (Def.'s Mot. 14.) This case was dismissed as moot, in 1993, after BLM issued First Half of Mineral Entry Final

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[12] Larson, in 1989, would separate this application into nine applications at the request of the Utah BLM. (Pl.'s Mot. 1.)

Certificates in 1992. (*Id.*) In 1994, Larson transferred the claims to Crippled Horse Investments Limited Partnership ("Crippled Horse"). (*Id.*) Crippled Horse filed another suit to compel the Interior to complete processing of the patent applications in 1996, which was ultimately stayed after BLM agreed to file status reports every 60 days regarding its progress. (*Id.*)

In 1997, defendants filed an adjudicative contest complaint against two of the mining claims, asserting that they were invalid for lack of discovery of valuable minerals and failure to meet assessment work requirements. (Pl.'s Mot. 1.) Later that year several of the claims were declared voided on the grounds that the defendants had already declared them "null and void" for want of assessment work during 1931, in 1932-1933. By June of 1997, however, the Utah State BLM rescinded that decision without explanation. (Compl. 16.)

In 1999, BLM researched Uintah County (where the claims are located) records for affidavits, required by state law, which demonstrate that the assessment work required by the Mining Law was conducted. (Def.'s Mot. 15.) BLM found that the claims lacked affidavits proving the completion of annual assessment work for periods ranging from fifteen to thirty-five years between 1932 and 1970. (*Id.*) Based on the absence of affidavits, on September 2, 1999, BLM inferred that the assessment work had not been completed and issued a decision declaring all 156 oil shale claims void. (*Id.*) There are no allegations or evidence in the record that the required assessment work was not

resumed and completed annually for the near thirty years between 1970 and BLM's decision.

On October 4, 1999, Crippled Horse and Larson's Estate appealed BLM's decision to IBLA. (*Id.* at 16.) IBLA affirmed and the plaintiff filed a complaint on May 14, 2004, challenging IBLA's decision and seeking an order compelling the defendants to process plaintiff's patent applications. (*Id.* at 17-18.)

III. DISCUSSION

A. Legal Standards

1. Standard of Review

The Administrative Procedure Act provides that the reviewing court shall, "hold unlawful and set aside agency action, findings, and conclusions found to be – arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). It is a highly deferential standard of review that presumes the agency action to be valid. *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). The court must affirm the agency's decision if a rational basis for that decision exists, even if the court disagrees. *Bubala v. Lujan*, 1991 U.S. Dist. LEXIS 1211, 4-5 (D.D.C. 1991) (citing *Environmental Defense Fund, Inc.*, 657 F.2d at 283)). While deferential to agency action, the courts' review of the facts must be searching and careful; the agency's action must be based on a consideration of relevant factors. *Id.* (citing *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416). The

scope of review is usually confined to the full administrative record before the agency at the time the agency action was taken. *Bubala*, 1991 U.S. Dist. LEXIS 1211, 4-5 (D.D.C. 1991) (citing *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 825)).

2. Summary Judgment

The Court must grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). While the moving party bears the burden of demonstrating a lack of genuine issues of material fact, *Rule 56* further requires that the non-moving party "go beyond the pleadings by [entering evidence] showing there *is* a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986) (emphasis added). The presence of disputed facts by itself is insufficient to defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). An issue of material fact qualifies as genuine only if there is evidence on which a jury could base a verdict for the non-moving party. *Id.* at 248.

If the moving party is successful, that party is entitled to summary judgment as a matter of law, if the opposing party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. In making this determination, the Court must view all inferences "in the light most favorable to the non-moving party." *Matsushita Elec.*

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-588 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

B. Statute of Limitations

Plaintiff asserts a convincing argument that, by application of 28 U.S.C. § 2462, IBLA's decision is barred by statute of limitations. (Pl.'s Mot. 16-17.)[13] The statute provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462. Unfortunately, while defendant's substantive arguments are not

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[13] Plaintiff also asserts a laches defense. (Pl.'s Mot. 35-36.) However, "[2 [n]o rule is better established than that the United States are not bound by limitations or barred by laches where they are asserting a public right." *Illinois C. R. Co. v. Rogers*, 253 F.2d 349, 353 (D.C. Cir. 1958). While the court finds it outrageous and inexcusable that the defendants' challenges to the oil shale claims were made approximately twenty-nine years after any alleged lapses in assessment work, and after the plaintiff's predecessors-in-interest filed suit twice to compel processing of their patent applications, there is no basis on which to deviate from the rule barring the use of laches against the government where it is acting in the public interest.

persuasive (Def.'s Mot. 20-22.),[14] plaintiff has waived this argument by failing to first present it before the agency. It is well-settled that objections to agency proceedings must be presented to the agency "in order to raise issues reviewable by the courts." *See Salt Lake Community Action Program v. Shalala*, 11 F.3d 1084, 1087 (D.C. Cir. 1993) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)); *see also Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 156 (D.C. Cir. 1985); *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 680 (D.C. Cir. 1983). The policy underlying the waiver rule is that "judicial review might be hindered by the failure of the litigant to allow the agency to make a factual record, exercise its discretion, or apply its expertise." *See Salt Lake Community Action Program*, 11 F.3d at 1087 (citing *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1338 (D.C. Cir. 1983)).

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[14] Defendant's attempt to construe this forfeiture action as outside the realm of the statute by arguing that it is not punitive by nature is disingenuous and inaccurate. The Supreme Court indicated that invalidation of claims based on "noncompliance with the requirements of law" qualifies as a forfeiture of the claims. *United States v. Locke*, 471 U.S. 84 (1985) (describing the common law distinction between abandoned and forfeited property and later stating, "Legislatures can enact substantive rules of law that treat property as forfeited under conditions that the common-law would not consider sufficient to indicate abandonment.")(citations omitted). Further, the D.C. Circuit has specifically indicated that this statute of limitations applies to agency actions, stating, "[T]here is no discernible rationale for applying § 2462 when the penalty action or proceeding is brought in a court, but not when it is brought in an administrative agency." *3 M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994).

Further, this statute of limitations specifically applies at the agency level. The language of § 2462 states that it applies to an "action, suit or proceeding." "[P]roceeding" refers not only to judicial business, but also to administrative proceedings before agencies. *Samedan Oil Corp. v. Deer*, 1995 U.S. Dist. LEXIS 10158 (D.D.C. 1995). Plaintiff's rationalizations for the failure to present this issue to the agency are unavailing. Therefore, as the statute of limitations expressly applies to agency determinations, the plaintiff was obligated to raise the issue before the IBLA. Having failed to do so, plaintiff waived judicial review of this issue.

C. Defendants' Retroactive Application of Regulations

"Retroactivity is not favored in the law . . . a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (U.S. 1988) (where retroactive application of a cost-limiting rule was not permitted). Retroactivity takes place where the "*past* legal consequences of past actions" are altered. *Bowen*, 488 U.S. at 219 (Scalia, J. concurring) (as opposed to secondary retroactivity which involves a prospective rule which nonetheless effects past transactions).

The defendants admit that until 1993 (twenty-three years after the alleged lapses of assessment work), Interior's own regulations allowed for noncompliant claimants to remedy assessment work

performance failures by resuming work. (Def.'s Mot. 38 (citing 43 C.F.R. § 3851(b) (2003).) Defendants assert that the 1993 amendment to its regulations "merely reflects the 1970 *Hickel* decision", which Interior interprets as having terminated the resumption doctrine as it applies to oil shale claims.[15] (*Id.*) Now, the defendants are attempting to invalidate plaintiff's claims for lapses in assessment work that occurred before either the amended regulation or the *Hickel* decision came into existence. (Def.'s Mot. 15.) "The legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Regions Hosp. v. Shalala*, 522 U.S. 448, 456 (1998) (quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (SCALIA, J., concurring)) (citations omitted). The defendants' application of regulatory changes made subsequent to the alleged assessment work lapses is unreasonable as it radically alters the legal consequences for plaintiff's past actions.

A regulation is being applied retroactively when it "impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed." *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). In the present case, application of the 1993 amendment or the agency's contemporary interpretation of the 1970 *Hickel* decision impairs the plaintiff's right of resumption which was not

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[15] Note that this court specifically does not reach the issue of whether this is a reasonable interpretation of *Hickel*.

successfully contested at the time of the work lapses, on which the plaintiff relied (having resumed work for nearly thirty years after 1970). Further, this retrospective application increases the plaintiff's liability for past work lapses. At the time the alleged assessment work lapses occurred, it was understood that resumption of work before action was brought by the government to invalidate the claims would remedy these failures. As it impairs rights the plaintiff possessed at the time of the alleged conduct and increases the plaintiff's liability for that past conduct, the application of the amended regulation is impermissibly retroactive.

The defendants argue that the changes in policy are immaterial because once the plaintiff failed to comply with the assessment work requirements under the Mining Law, the plaintiff could no longer access the resumption provisions of the regulation (or the Mining Law) to preserve the claims. (Def.'s Mot. 35.) Essentially, the defendants argue that plaintiff could not rely on the specific language of the statute or the accompanying regulation, allowing preservation through resumption, because plaintiff had already lost the benefit of the regulation's opportunity to resume work by allowing the work to lapse in the first place. (*Id.*) This is a startling example of circular logic, that flies in the face of the obvious intent of the Mining Law and the Interior's regulation (previous to the 1993 amendment).

Defendants, relying on *Exxon Mobil Crop. v. Norton*, next urge that because "the *Hickel* court [] conclud[ed] that the United States 'had, and has, subject matter jurisdiction over contests involving

the performance of assessment work,'" despite an Interior regulation to the contrary, the existence of a regulation allowing resumption of assessment work should not deter this Court from denying plaintiffs the benefit of resumption. 206 F.Supp.2d 1085, 1091 (10th Cir. 2002) (citations omitted). However, neither the discrepancy between the regulation and the court's ultimate conclusion nor retroactivity were raised in *Hickel*. Therefore, the Supreme Court never addressed the issue.

Further, Interior was free to announce its new policy through either rulemaking or adjudication. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294, (1974) (holding that an agency's decision to choose either rule-making or case-by-case adjudication is subject to reversal only if the agency committed an "abuse of discretion or a violation of [law]."). Interior proceeded under rulemaking, a sound decision given the strong policy reasons preferring rulemaking over adjudication to set forth new policies when feasible:

> Rule-making is an essential component of the administrative process and indeed is often the preferred procedure for the evolution of agency policies. Rule-making permits more precise definition of statutory standards than would otherwise arise through protracted, piecemeal litigation of particular issues. It allows all those who may be affected by a rule an opportunity to participate in the deliberative process, while adjudicatory proceedings normally afford no such protection to nonparties. And because rule-making is

> prospective in operation and general in scope, rather than retroactive and condemnatory in effect, interested parties are given advance notice of the standards to which they will be expected to conform in the future, and uniformity of result is achieved.

Christopher Shays & Representative v. FEC, 2006 U.S. Dist. LEXIS 13632 (D.D.C. 2006) (quoting *Trans-Pac. Freight Conference of Japan/Korea v. Fed. Mar. Comm'n*, 650 F.2d 1235, 1244-45 (D.C. Cir. 1980)) (emphasis added). Having exercised sound discretion in proceeding under rulemaking, Interior may not now turn around and apply the rule ("prospective in operation") to conduct that preceded it. *Id.*

The critical question for determining whether a regulation is being applied in an impermissibly retroactive manner is whether the new interpretation "changes the legal landscape." *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (quoting *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994)) (citations omitted). In the present case, there is no question that Interior's interpretation of *Hickel* and subsequent regulatory changes represent changes to the law plaintiffs (and their predecessors-in-interest) operated under previous to 1970. While it is certainly within the scope of the agency's informed discretion to update its regulations based on evolving interpretations of case law and statutory language, it is arbitrary and capricious to apply these new policy interpretations and regulations to past conduct because it forecloses the plaintiffs

opportunity to avoid adverse consequences by operating in conformity with the agency's position.

Accordingly, while on its face the current version of 43 C.F.R. § 3851(b) does not operate in retrospect, the agency's application of the regulation (or the policy changes which precipitated its amendment) to past conduct is impermissibly retroactive. Therefore the challenges to plaintiff's mining claims based on that application must fail as arbitrary and capricious.

IV. CONCLUSION

For the foregoing reasons, this Court concludes that the plaintiff has met its summary judgment burden. Accordingly, and for the reasons stated herein, Orion's motion for summary judgment will be GRANTED and defendants' cross-motion will be DENIED.

A separate Order shall issue this date.

Signed by Royce C. Lamberth, United States District Judge, March 31, 2006.

CRIPPLED HORSE INVESMENTS, L.P.
ESTATE OF FREDERICK H. LARSON

161 IBLA 264 Decided May 10, 2004

Editor's Note: Appeal Filed, Civil Action No. 04-791 (RCL) (D. D. C.), *rev'd sub nom., Orion Reserves Limited Partnership v. Kempthorne*, 516 F. Supp 2d 8 (June 28, 2007).

United States Department of the Interior
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Interior Board of Land Appeals
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CRIPPLED HORSE INVESTMENTS, L.P.
ESTATE OF FREDERICK H. LARSON

IBLA 2000-10 Decided May 10, 2004

Appeal from a decision of the Utah State Office, Bureau of Land Management, declaring 156 oil shale placer mining claims, under applications for patent abandoned and void. UTU 63241, 65591-65598.

Affirmed.

1. Mining Claims: Assessment Work--Mining Claims: Determination of Validity--Mining Claims: Patent

Pursuant to the Mining Law of 1872, oil shale mining claimants were required to meet an "assessment work requirement" of "not less than $100 worth of labor or improvements annually for the benefit of each mining claim until patent was issued." 30 U.S.C. § 28 (2000).

2. Mining Claims: Assessment Work--Mining Claims: Determination of Validity--Mineral Leasing Act: Generally

Oil shale deposits were withdrawn from location under the Mining Law of 1872 by the

Mineral Leasing Act of 1920 (MLA), and thereafter became subject to disposition only by leasing. 30 U.S.C. §§ 193, 241(a) (2000). Section 37 of the MLA preserved valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated. 30 U.S.C. § 193 (2000).

3. Mining Claims: Assessment Work--Mining Claims: Determination of Validity

Token assessment work, or assessment work that does not "substantially satisfy" the requirements of 30 U.S.C. § 28 (2000) is not adequate to maintain oil shale claims. Pursuant to Section 37 of the MLA, 30 U.S.C. § 193 (2000), the United States is the beneficiary of oil shale mining claims which become invalid for failure to substantially satisfy the assessment work requirements of 30 U.S.C. § 28 (2000).

4. Mining Claims: Assessment Work--Mining Claims: Determination of Validity

In determining whether oil shale mining claimants have substantially satisfied assessment work requirements, the Board will consider the quantum of the assessment work actually performed and the length of time the claimant failed to meet the annual assessment work required by the Mining Law of 1872.

5. Evidence: Sufficiency--Mining Claims: Assessment Work--Mining Claims: Determination of Validity

Where State law requires the annual filing of affidavits of assessment work performed and further provides that such affidavits shall constitute prima facie evidence of the facts asserted therein, BLM properly considers whether assessment work affidavits were filed with the county recorder in the county where the claims are located to determine whether the assessment work requirements of 30 U.S.C. § 28 (2000) were substantially satisfied. The absence of annual assessment work affidavits in the county recorder's office establishes a prima facie case that no assessment work was performed, thus shifting the burden of proof to appellants.

6. Evidence: Sufficiency--Mining Claims: Assessment Work--Mining Claims: Determination of Validity

Where appellants failed to file affidavits of assessment work for 156 unpatented oil shale claims for decades, with and without brief interludes when such affidavits were filed, such patterns constitute token assessment work and fail to substantially satisfy the requirements of 30 U.S.C. § 28 (2000). In such cases, the oil shale claims are properly declared abandoned and void.

7. Administrative Procedure: Hearings--Evidence: Sufficiency--Hearings--Rules of Practice: Hearings

The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim. 43 CFR 4.451-1. No contest pursuant to 43 CFR 4.451-1 or hearing pursuant to 43 CFR 4.415 is necessary when the material facts are undisputed.

APPEARANCES: Donald L. Morgan, Esq., Washington, D.C., for apellants; David K. Grayson, Esq., Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Crippled Horse Investments and the Estate of Frederick Larson (appellants, CHI) have appealed from a September 2, 1999, decision of the Utah State Office, Bureau of Land Management (BLM), declaring 156 oil shale mining claims abandoned and void for failure to maintain the claims in accordance with the assessment work requirements of the Mining Law of 1872 (mining law), 30 U.S.C. § 28 (2000),[16] and Section 37 of the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. § 193 (2000).

The 156 claims were located in 1917, 1918, or 1919. Frederick H. Larson filed a patent application

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[16] At the time the decision was issued, the 1994 U.S. Code was in effect. The statutes cited are unchanged in the 2000 codification.

for the claims with the Utah State Office on March 17, 1988. That application was subsequently divided into nine separate patent applications.[17] First Half Final Certificates (FHFC's) were issued for the patent applications on October 9, 1992. All of the rights, title, and interest in the 156 claims were conveyed by quitclaim deed from Frederick H. Larson to CHI on March 4, 1994.

As the decision notes, oil shale was initially subject to location under the mining law, 30 U.S.C. § 28 (2000). It was later made subject to disposition only through leasing pursuant to Section 21 of the MLA, 30 U.S.C. § 241 (2000). (Decision at 1-2.) The decision acknowledged that Section 37 of the MLA, 30 U.S.C. § 193 (2000), contains a savings provision for oil shale claims located prior to February 25, 1920, which are thereafter maintained "in

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[17] The patent application serial numbers and corresponding mining claim numbers are denominated in Attachment A to the decision as follows:

Patent Application UTU 63241: UMC Nos. 65858-65875, 65893, 65902-65921,65924-65926, 65931-65932, 65952-65954, 66003-66004, 66009-66016, 66019-66020, and 66024-66030.

Patent Application UTU 65591: UMC Nos. 65962, 66017, 66031-66041, 66043, 66046-66049, 66054-66055, 66062-66068, 66073-66074, 66077-66079, and 66081.

Patent Application UTU 65592: UMC Nos. 66080 and 66082.

Patent Application UTU 65593: UMC Nos. 65950-65951.

Patent Application UTU 65594: UMC No. 66083.

Patent Application UTU 65595: UMC No. 66018.

Patent Application UTU 65596: UMC Nos. 65969-65980, 65994-*65996*, 65981-65993, and 65997-66002.

Patent Application *UTU 65597*: UMC Nos. 65876-65883 and 65885-65892.

Patent Application UTU 65598: UMC No. 65884.

compliance with the laws under which initiated." The decision further noted that, pursuant to 30 U.S.C. § 28 (2000), oil shale mining claimants were required to meet an "assessment work requirement" of "not less than $100 worth of labor or improvements annually for the benefit of each mining claim until patent was issued." *Id.* at 2. The decision stated that if assessment work requirements were not met, oil shale mining claims become void, and "'subject to disposition only' by leasing to [sic] the United States." *Id.*

BLM's decision then considered the assessment work history for the 156 claims at issue. Noting that Utah Code § 40-1-6 (1996) requires "holders of mining claims filed pursuant to 30 U.S.C. § 28 to file annual assessment work filings within thirty days after completing work or improvements on the oil shale claim with the county recorder to avoid forfeiting the claim," the decision indicated that the assessment work records on file in the Uintah County Recorder's office pertaining to the 156 mining claims had been reviewed. BLM reviewers found that annual filings had not been made "for substantial periods of time." (Decision at 3.) The decision stated that, as the claims were located between 1917 and 1919,

> in order to have been properly maintained, the claimant should have done assessment work on the claims for each year for a period of seventy-two to seventy-four years. * * * In fact, the claimant did not conduct assessment work for numerous years, as evidenced by the claimant's failure to file

> assessment work filings with the county for periods ranging in length from twelve to thirty-eight years.

Id. at 2-3. BLM noted that the period from July 1, 1931, to July 1, 1932, was not considered "for purposes of determining the total number of nonperformance years," because by statute that period was "the only time period for which no physical assessment work and assessment work filings were required." *Id.* at 3.

BLM prepared a 21-page table listing each of the claims covered by Patent Applications UTU No. 63241 and UTU Nos. 65591-65598. Among other things, the table details the years in which no assessment work certifications were filed with the Uintah County Recorder.[18] According to that table, no assessment work filings had been made for 18 to

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[18] The tabulation, appended to BLM's decision as Attachment A, identifies the patent application to which the particular claim relates (column a); the name and serial number of the claim (column b); the total number of assessment years (column c); the number of years work was excused by Congress (column d); the total number of years for which, pursuant to the provisions of the Federal Land Management and Policy Act of 1976, 43 U.S.C. § 1744(a) (2000), notices of intention to hold the claim (NOI's) were filed (column e); the total number of years affidavits were filed (column f); the grand total of years for which either an NOI or an affidavit of annual labor performed were filed (column g); the years in which there was no NOI or annual labor filing (column h); the years when there was no filing and the number of consecutive years in non-compliance (column i); the number of entries attached to support the information thus reflected (column j); and a comment section (column k). The table is presented in descending tiers, so that the claims for which the single longest consecutive period(s) of non-compliance appear first.

20 years out of a total of 73 assessment years for UMC Nos. 65902-65915, 65921, 65924-65926, and 65931-65932. With regard to the other 136 claims, BLM concluded that the total number of years for which no evidence of assessment work was filed was 39 to 51 years, out of a possible 72 to 74 assessment years. Relying on the decisions in *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 57 (1970), and *John J. Herr*, 130 IBLA 349, 367, 101 I.D. 113, 122 (1994), BLM held that the "resumption doctrine"[19] would not apply to CHI's claims, because the claimants had failed to "substantially comply" with the assessment work requirements of the general mining law. (Decision at 2-3.)

Legal Framework

[1] Placer claims are subject to entry and patent in the same manner as lode claims. 30 U.S.C. § 35 (2000). Oil shale was made subject to location and entry as a placer claim by the Act of February 11, 1897, 29 Stat. 526. The mining law called for the annual expenditure of $100 worth of labor or improvements, also referred to as "assessment work," on or for the benefit of a mining claim each year until patent issues. 30 U.S.C. § 28 (2000).

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[19] The "resumption doctrine" arises from the mining law, which established the conditions under which a mining claimant preserved his possessory right to a mining claim, including the obligation to perform annual assessment work: "[U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." 30 U.S.C. § 28 (2000).

Specifically, the mining law provides, in pertinent part, that "[o]n each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year." 30 U.S.C. § 28 (2000). The purpose of the assessment work requirement was "to assure the claimant's good faith and diligence, to encourage development of the west's mineral resources, and to prevent a claimant from locating numerous mining claims and holding the claims without working them, thus preventing others from occupying and developing the property." 2 *American Law of Mining* § 45.02 (2d ed. 2002).

However, the mining law also provided that failure to comply with assessment work and other conditions would open the claim to relocation, assuming the claim holder had not resumed work on the claim before the relocation occurred. 30 U.S.C. § 28 (2000). Thus, failure to perform assessment work did not result in automatic forfeiture and restoration to the public domain, or even subject it to invalidation by the United States; it merely opened the claim to relocation before work resumed. Only abandonment restored the claim to the public domain, and only a relocation by an adverse claimant caused forfeiture, a matter that could be raised only in the courts by rival claimants. 2 *American Law of Mining* § 45.08[2][a] (2d ed. 2002) and cases cited.

[2] Oil shale deposits were withdrawn from location and became subject to disposition only by leasing pursuant to the Mineral Leasing Act of 1920 (MLA). 30 U.S.C. § 193 (2000); *see also* 30 U.S.C. § 241(a) (2000). Section 37 of the MLA preserved

"valid [oil shale] claims existent on February 25, 1920, *and thereafter maintained in compliance with the laws under which initiated*, which claims may be perfected under such laws, including discovery." 30 U.S.C. § 193 (2000) (emphasis added). Since oil shale no longer was a locatable mineral, such claims were no longer vulnerable to relocation by rival claimants. *Wilbur v. Krushnic*, 280 U.S. 306, 317-18 (1930), and *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639, 646- 47 (1935), established that failure to perform annual assessment work did not ipso facto result in forfeiture to the United States, and that the United States lacked the authority to challenge oil shale claims on that basis.

[3] In 1970, the Supreme Court confined and substantially retreated from the construction set forth in *Wilbur* and *Ickes*. In *Hickel v. Oil Shale Corp.*, 400 U.S. at 48, the Supreme Court examined the legislative history of the mining law and the MLA's savings clause and concluded that "token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28, is not adequate to 'maintain' the claims within the meaning of § 37 of the [MLA]." *Id.* at 57. Confining *Krushnic* and *Ickes* to situations in which the claim holders had substantially complied with the assessment work requirement, the Court held that "§ 37 of the MLA makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise," and that the Department has subject matter jurisdiction to determine whether such claims have been maintained by performance of annual labor. *Id.*; *see also* 2 *American Law of Mining* (2d ed.) §§ 45.08[2][a] - 45.09[4]. In 1972, the Department

promulgated 43 CFR 3851.3(a) and (b) to adopt the principles established by *Hickel*, and since then, the Department's view that an unpatented mining claim could be declared void for failure to perform annual assessment work has been firmly rooted. *Jerry D. Grover d.b.a. Kingston Rust Development (Grover III)*, 160 IBLA 234, 247-48 (2003); *U.S. v. TOSCO Corp.*, 153 IBLA 205, 213 (2000), *aff'd, Exxon Mobil Corp. v. Norton*, 206 F.Supp. 2d 1085, 1090-91 (D. Colo. 2002).

On October 24, 1992, the Energy Policy Act of 1992 (EPA), 30 U.S.C. § 242 (2000), was enacted. The EPA radically altered the mining law as it pertained to oil shale claims. Among other things, the EPA recognizes three classes of oil shale mining claimants, based on whether patent applications have been filed, whether they were filed on or before October 24, 1992, whether a first half final certificate (FHFC) has been issued, and whether claimants holding unpatented claims wish to proceed and receive a limited patent.[20] As a result of the

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[20] Those who had filed a patent application on or before Oct. 24, 1992, but who had not received an FHFC can receive only a patent limited to "oil shale and associated minerals," upon payment of $2.50 per acre, and they must maintain their claims "in accordance with the requirements of applicable law prior to enactment of [the EPA]." 30 U.S.C. § 242(c)(1) (2000). All others who had not filed an application were required to elect a course of action and file an application within the periods specified by the EPA, and can receive only "oil shale associated minerals" [sic], upon payment of the fair market value per acre. 30 U.S.C. § 242(d) (2000). In addition, persons subject to the provisions of subsections (c)(3) and (d) of the EPA, 30 U.S.C. § 242(c)(3 and (d) (2000), must maintain possession of their oil shale claims as against the United States by paying $550 per claim per year in lieu of performing assessment work, as

EPA, only claimants who had filed a patent application and received an FHFC on or before October 24, 1992, can now receive a full patent, upon payment of $5 per acre, as provided by 30 U.S.C. § 29 (2000). 30 U.S.C. § 242(b) (2000).[21] As appellants' claims are subject to the provisions of subsection (b) of the EPA, however, as BLM observed in its decision, the question presented is whether they maintained them within the meaning of the savings clause of Section 37 of the MLA by substantially complying with the assessment work requirements set forth in the mining law, 30 U.S.C. § 28 (2000).

The Parties' Arguments

In its Statement of Reasons on appeal (SOR), CHI has advanced a number of arguments, which may be broadly summarized as follows: (1) CHI has been denied "notice and opportunity to be heard,"

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provided in subsection (e) of the EPA, 30 U.S.C. § 242(e) (2000), failing in which the claims may be declared null and void. For a complete analysis of the EPA, *see Grover III*, 160 IBLA 250-52, 254-56.

[21] Performance of assessment work is not required after the date that FHFC is issued: "The assessment year in which the mineral entry is allowed is the first assessment year for which the assessment work is no longer required, and assessment work is not required in any assessment year thereafter if a mineral patent issues." 43 CFR 3851.5 (1993). The regulation currently provides: "The assessment year in which the mineral entry is allowed is the first assessment year for which the assessment work is no longer required, and assessment work is not required in any assessment year thereafter *until* a mineral patent issues." (Emphasis added.) *See also Silver Crystal Mines, Inc.*, 147 IBLA 146 (1999); *Hugh D. Guthrie*, 145 IBLA 149 (1998). The 1993 assessment year commenced at noon on Sept. 1, 1992. Appellants received their FHFC on Oct. 4, 1992.

because BLM invalidated its claims without first proceeding to a contest hearing (SOR ¶¶ 1-3, at 17-18); (2) appellants have substantially complied with the requirements of the mining law, as they resumed assessment work and have therefore cured any prior default (SOR ¶¶ 4-5, at 12); (3) the fact that assessment work filings were not made by claimants does not merit a conclusion that no assessment work was performed for those periods of time (SOR ¶ 8 at 3-4); and (4) BLM's decision to the contrary deviates from longstanding judicial and Departmental interpretation of federal and state laws pertaining to the maintenance of oil shale claims, and therefore the Department should be barred by laches and estoppel from declaring the claims invalid. (SOR ¶¶ 6-11 at 13-16).

BLM responds by arguing that (1) appellants are not entitled to a contest hearing as the issue of whether a discovery of a valuable mineral deposit has been made is irrelevant to the issues on appeal (Answer at 4-5); (2) the Supreme Court has repudiated the resumption doctrine, and appellants therefore may not rely on it to excuse their failure to substantially comply with the assessment work requirements of the mining law (Answer at 3-4); (3) evidence of assessment work filed in the county recorder's office is the "best evidence" that such work was actually performed, and appellants may not rely on the resumption doctrine to excuse it from establishing that the assessment work was completed as required (Answer at 5-7); and (4) BLM relied on solid legal precedent in declaring the claims abandoned and void, and appellants have not cited any Departmental rule which historically served to prohibit BLM from invalidating mining

claims for failure to comply with the assessment work requirements of the mining law; therefore, the Department is not estopped from declaring the claims abandoned and void (Answer at 7-8).

Analysis

In arguing that it has substantially complied with the mining law by resuming assessment work prior to relocation by another locator, CHI relies primarily on the decisions in *Krushnic*, 280 U.S. at 306, *Virginia-Colorado Development Corp.*, 295 U.S. at 639, and *Cliffs Synfuel Corp. v Babbitt*, 147 F.Supp. 2d 1118 (D. Utah 2001), *rev'g United States v. Cliffs Synfuel Corp.*, 146 IBLA 353 (1998). As in the present case, Cliffs Synfuel held FHFC's which had been issued prior to October 24, 1992, thus qualifying the claims for full patent under the EPA, assuming they were otherwise valid. Cliffs Synfuel's claims had been located in 1917. After a 46-year hiatus, assessment work was resumed in 1977. *Cliffs Synfuel Corp. v. Norton*, 291 F.3d 1250, 1255 (10th Cir. 2002). The Department contested the claims, alleging lack of substantial compliance with the assessment work requirement. The Administrative Law Judge determined that the owners had made a valid discovery of a valuable mineral deposit, but ruled that the claims were invalid for failure to comply with the assessment work requirement. This Board affirmed, relying on our prior decision in *United States v. Herr*, 130 IBLA at 367, 101 I.D. at 122, in which we held that "the resumption doctrine is no longer applicable to oil shale claims." *United States v. Cliffs Synfuel Corp.*, 146 IBLA at 360.

On appeal, the District Court reversed, holding that "nothing in the *Hickel* opinion suggests that the Supreme Court intended to abrogate the resumption doctrine," concluding that the Board had misinterpreted *Hickel* in both *Herr* and in *Cliffs Synfuel. Cliffs Synfuel Corp. v. Babbitt*, 174 F.Supp. 2d at 1123-25.

However, the District Court decision was reversed in *Cliffs Synfuel Corp. v. Norton*, 291 F.3d 1250 (10th Cir. 2002), *cert. denied*, 123 S.Ct. 884 (2003), in which appellants appeared as amici curiae. While it did not embrace the Board's broad assertion that the resumption doctrine no longer applied to oil shale claims, the Tenth Circuit nonetheless squarely rejected the assertion that Cliffs Synfuel's oil shale claims had been maintained under the mining law and therefore came within the savings clause of Section 37 of the MLA. *Cliffs Synfuel Corp. v. Norton*, 291 F.3d at 1259 n.4. Indeed, the Tenth Circuit held that the District Court's reliance upon the Supreme Court's ruling in *Krushnic* was error, because in the *Hickel* decision the Supreme Court had retreated from *Krushnic*. Thus, the Tenth Circuit determined that the District Court had erred by holding that the United States was barred from invalidating Cliffs Synfuel's claims after it resumed work following substantial lapses in performing the obligation, observing:

> In its more precise approach in *Hickel* that limited the sweep of *Krushnic* and *Virginia-Colorado*, the Court validated the ability of the government, as the "beneficiary of all claims invalid for lack of assessment

> work," *sua sponte* to challenge pre-1920 oil shale claims. The Court referred to the legislative history of the Mining Law of 1872 and emphasized that "[w]hile the objective of the 1872 Act was to open the lands 'to a beneficial use by some other party,' once the original claimant defaulted, the defeasance inevitably accrued to the United States, owner of the fee." *Id.* at 55, 91 S.Ct. 196. The Court declared that "we are of the view that § 37 of the 1920 [Mineral Leasing] Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise." *Id.* at 57, 91 S.Ct. 196.

Cliffs Synfuel Corp. v. Norton, 291 F.3d at 1260-61, citing *Hickel*, 400 U.S. at 57.

[4] Moreover, the *Hickel* Court confined *Krushnic* and *Virginia-Colorado* to their facts. In *Krushnic*, oil shale claims were located on October 1, 1919; the owners defaulted in annual assessment work for a single year; they resumed work for the succeeding assessment year and filed a patent application in the year that followed. *Wilbur v. Krushnic*, 280 U.S. at 315. In *Virginia-Colorado*, the claims were located in 1917 and assessment work was performed annually until 1931. Work was not performed during the assessment year that then ended on July 31, 1931, but the claimant had made arrangements to resume work and would have performed it, had the Department not challenged the claims on September 4, 1931. Thus, the claimant had

only a one-year lapse in performance of assessment work over a 14-year period. *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. at 643. Those facts led the Court to conclude that "*every* default in assessment does not cause the claim to be lost. Defaults, however, might be the equivalent of abandonment." *Hickel v. Oil Shale Corp.*, 400 U.S. at 57 (emphasis supplied). On the other hand, "token assessment work," or assessment work that does not "substantially satisfy" the requirements of 30 U.S.C. § 28, is not adequate to maintain the claims. *Id.* Accordingly, we agree with the Tenth Circuit that "it logically follows that in each case we must consider the quantum of the actual assessment work performed and the length of time the claimant failed to meet the annual assessment work required by the Mining Act of 1872." *Cliffs Synfuel Corp. v. Norton*, 291 F.3d at 1259. We now undertake that task with respect to appellants' claims.

[5] Before examining the information provided by BLM in Attachment A, we first address appellants' argument that the absence of assessment work affidavits in the county recorder's office fails to establish that assessment work was not performed on the claims. We agree, at least in the abstract. More to the point, however, the absence of assessment work affidavits in the county recorder's office is more properly a question of the parties' respective burdens of proof.

As BLM notes, State law is pertinent. It requires, "if assessment work was required to be performed under 30 U.S.C. Sec. 28 or other federal law to maintain the claim," the filing of a "statement that the annual assessment work required to

maintain the claim was performed." Utah Code § 40-1-6(2)(c).[22] Such statement must be filed within 30 days of the end of the annual period specified in 30 U.S.C. § 28 (2000). Utah Code § 40-1-6(2). State law further provides: "The affidavit, or a certified copy, shall be prima facie evidence of the facts stated in the affidavit." Utah Code § 40-1-6(3). Having assembled and presented evidence that no affidavits of annual labor were filed for certain years, BLM made a prima facie case that none were filed because the work was not performed. The burden then shifted to appellants to demonstrate otherwise, by a preponderance of the evidence. *United States v. Haskins*, 59 IBLA 1, 102, 88 I.D. 925, 976 (1981), *aff'd*, No. 82-2112 (C.D. Cal. Oct. 30, 1984); *United States v. Bohme*, 48 IBLA 267, 303-05, 87 I.D. 248, 264-65 (1980,) *appealed sub nom*, *Tosco v. Watt*, *rev'd*, 611 F. Supp 1130 (D. Colo. May 1, 1985), *dismissed as moot*, 826 F.2d 948 (10th Cir. Aug. 12, 1987).

While they contend that "the Utah statute provides no support for the conclusion that failure to file affidavits establishes that the work was not done" (SOR at 3, emphasis in original), appellants have had ample opportunity to produce countervailing evidence of assessment work performed, if it exists, and have not done so.[23] BLM

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[22] It appears that a version of the basic filing requirement has been in place in Utah since 1898. In any event, however, appellants do not claim that there was no such State filing obligation in any of the years here at issue.

[23] In that regard, it is actual performance of annual labor that is dispositive, not merely the filing of a statement that it was done. *United States v. Haskins*, 59 IBLA at 54, n. 37, 88 I.D. at 952, n. 37.

has provided copies of all assessment work documents reviewed, and appellants do not object to the authenticity of those records. They do not contest the accuracy of BLM's review of the records as reported in Attachment A. Moreover, as will be shown below, there were years in which affidavits were filed, which buttresses the inference that, in fact, no annual labor was performed in the years when no affidavits were filed. *See also United States v. Hix*, 136 IBLA 377, 380 (1996). We therefore conclude that Attachment A and the documentation supporting it are properly considered probative evidence of the nature and extent of appellants' compliance with the assessment work requirement. Accordingly, in the absence of evidence to the contrary, the absence of proofs of annual labor or other certification in the county recorder's office attesting to assessment work performed properly establishes that no such filings were made because no work was performed for the years in question. *See Cliffs Synfuel Corp. v. Norton*, 291 F.3d at 1260.

[6] We now turn to the information recorded on Attachment A to determine whether the assessment work documented in the Uintah County Recorder's office for the 156 claims at issue substantially satisfies the requirements of 30 U.S.C. § 28 (2000). Attachment A analyzes the claims from inception through the 1991-92 assessment year, which was the final year claimants holding more than 10 unpatented mining claims could satisfy the requirements of the mining law by performing assessment work.[24] Thus, the years at issue are

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[24] On Oct. 5, 1992, Congress passed the Interior Department and Related Agencies Appropriations Act of 1993 (Rental Fee Act), Pub. L. 102-381, 106 Stat. 1378-79 (1992). In lieu

those between 1917, 1918, or 1919, and the 1970-71 assessment year, when it is apparent that appellants began to comply with applicable law on a consistent basis.

In particular, we looked at four columns: the total number of years since the claim was located (column c); the number of years for which an NOI was filed (column e);[25] the number of years in which proofs of labor were filed (column f); and the number of consecutive years when nothing was filed (column i). In general, the table demonstrates a compelling pattern of lack of compliance for each claim. Thus, with respect to 122 of the claims, nothing was filed for at least 38 consecutive years out of 72 to 74 assessment years; 85 of those claims had additional periods in which nothing was filed, ranging from periods of 2 to 13 consecutive years. For another 9 claims, nothing was filed for 35 consecutive years.

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of the annual assessment work obligation imposed by the mining law, Congress substituted the requirement to pay an annual rental fee of $100 for every unpatented claim, mill site, or tunnel site for each of the 1992-93 and 1993-94 assessment years. *See* 30 U.S.C. § 28 (2000). By its terms, the rental fee applied to unpatented oil shale claims as well, since the statute did not exclude them or make different provision for them. In addition, Congress provided for a waiver of the rental fee for persons who qualified as small miners. The rental fee for both assessment years was due on or before Aug. 31, 1993. If a mining claimant failed to timely pay the rental fees, the claim was conclusively deemed abandoned. *See, e.g., Jerry D. Grover d.b.a. Kingston Rust Development (Grover IV)*, 160 IBLA 261, 265-66 (2003).

[25] If NOI's were filed, they were filed for 1-, 2-, 5-, 7-, or 20 year periods. FLPMA provides that the failure to file certain documents, including an NOI, conclusively constitutes an abandonment of the claim. 43 U.S.C. § 1744(c) (2000).

As to another 19 claims, nothing was filed for a consecutive period of 16 years; 11 of those claims had an additional period of consecutive years when nothing was filed, typically a 2-year period.

For a third group of 6 claims, nothing was filed for at lest one consecutive period of 12 years; typically, however, there were at least two such 11- or 12-year periods, plus two other periods consisting of 8 or 10 consecutive years, thus demonstrating a pattern in which the failure to file proofs of labor was punctuated by brief episodes of compliance for 2 to 4 years, followed by significant periods in which no proof of labor was filed. For example, on UMC 65916, which was located in 1918, there was no assessment work performed from 1920 to 1930, affidavits of annual labor were filed for a 2-year period, followed by a lapse of 8 years, in turn followed by 4 years when assessment work ostensibly was performed, and so on, concluding with a final lapse of 12 consecutive years before appellants or their predecessors began to regularly file affidavits, beginning with the 1970-71 assessment year. Clearly, the 156 oil shale claims in this case are a far cry from the single year of non-compliance at issue *Krushnic* and *Virginia-Colorado*, and accordingly, we find that the instances of sustained non-compliance over decades, with or without brief interludes of compliance, constitutes nothing more than token assessment work, and does not substantially satisfy the requirements of 30 U.S.C. § 28 (2000).[26] BLM therefore properly declared the claims null and void on this basis.

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[26] Further, we reject appellants' argument that their completion of $500 worth of assessment work required for

[7] Appellants have vigorously argued that a contest should have been initiated to provide a hearing. They are mistaken. The Government *may* initiate a contest for any cause affecting the legality or validity of any entry or settlement or mining claim. 43 CFR 4.415-1. However, no contest pursuant to 43 CFR 4.451-1 or hearing pursuant to 43 CFR 4.415 is necessary where the material facts are undisputed. *Taylor Energy Co.*, 148 IBLA 286, 295 (1999), and cases cited; *Robert C. LeFaivre*, 141 IBLA 310, 315 (1997); *Daniel D. Draper*, 109 IBLA 85, 87 (1989); *H.B. Webber*, 34 IBLA 362, 372 (1978).

Lastly appellants' arguments regarding laches and estoppel also must be rejected. Laches is not applicable in this case. "The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by the acquiescence of its officers or their laches, neglect of duty, failure to act, or delays in the performance of their duties." 43 CFR 1810.3(a); *United States v. California*, 332 U.S. 19, 40 (1947); *Ametex Corp.*, 121 IBLA 291, 294 (1991); *Joseph A. Barnes*, 78 IBLA 46, 60, 90 I.D. 550, 558 (1983), *aff'd*, *Barnes v. Hodel*, 819 F.2d 250 (9th Cir. 1980), *cert. denied*, 484 U.S. 1005 (1988).

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issuance of patent for oil shale claims satisfies the requirement of "substantial compliance" with the assessment work requirements of the mining law. Since the decision in *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428 (1892), it has been clear that only issuance of a final certificate relieved the claimant of performing assessment work. More recently, this argument was considered and rejected in *Exxon Mobil Corp. v. Norton*, 206 F.Supp. 2d at 1091; it was rejected by implication in *Cliffs Synfuel Corp. v. Norton*, 291 F.3d at 1251. *See also Jerry D. Grover d.b.a. Kingston Rust Development*, 139 IBLA 178, 181-82 (1997), and cases cited therein.

Nor is this a proper case for estoppel, as there was no affirmative misconduct by BLM, the essential predicate to invoking that equitable doctrine. *See Schweiker v. Hansen*, 450 U.S. 785, 788-89 (1981); *United States v. River Coal Co.*, 748 F.2d 1103, 1108 (6th Cir. 1984); *McNabb Coal Co. v. OSM*, 105 IBLA 29, 37 (1988). As we have repeatedly held, to invoke estoppel, a party must show detrimental reliance on a written decision issued by an authorized officer, *Jesse Hutchings*, 147 IBLA 357, 360 (1999); *Steve E. Cate*, 97 IBLA 27, 32 (1987), or a crucial misrepresentation and/or concealment of material facts, *United States v. Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978); *Salmon Creek Association*, 151 IBLA 369, 373 (2000); *D.F. Colson*, 63 IBLA 221, 224 (1982); *Arpee Jones*, 61 IBLA 149, 151 (1982).

All other arguments advanced by appellants not specifically addressed herein have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

T. Britt Price
Administrative Judge

I concur:

James F. Roberts
Administrative Judge

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Utah State Office
P.O. Box 45155
Salt Lake City, UT 84145-0155

IN REPLY REFER TO
3833 (UT932-OA)
UMC65858, et al.

September 2, 1999

DECISION

Crippled Horse Investments, L.P.	:	See
Estate of Frederick H. Larson	:	Attachment A
c/o Donald L. Morgan	:	
Cleary, Gottlieb, Steen & Hamilton	:	
2000 Pennsylvania Ave, N.W.	:	
Washington, DC 20006-1801	:	

Mining Claims Declared Abandoned and Void

This decision hereby declares the mining claims identified in Attachment A abandoned and void because of the claimant's failure to perform the requisite assessment work on the identified claims, as evidenced by the claimant's failure to file assessment work filings with the Uintah County Recorder's Office covering various years between 1920 and 1970. See Attachment A.

According to Bureau of Land Management (BLM) records, the 156 placer mining claims identified in

Attachment A were located in 1917, 1918, and 1919, in Uintah County, Utah. On March 17, 1988, Mr. Frederick H. Larson filed a patent application in the Utah State Office covering the subject claims. This patent application subsequently was divided into nine separate patent applications, identified by the following serial numbers: UTU Nos. 63241, 65591, 65592, 65593, 65594, 65595, 65596, 65597 and 65598. BLM issued First Half Mineral Entry Final Certificates (FHFC) for these patent applications on October 9, 1992. On March 11, 1997, BLM received a mining claim quitclaim deed dated March 4, 1994, wherein Mr. Frederick H. Larson quitclaimed to Crippled Horse Investments Limited Partnership (Crippled Horse) all of the rights, title and interest in the 156 unpatented mining claims.

Section 28 of the Mining Law of 1872, 30 U.S.C. 28 (1994), requires oil shale claimants to perform not less than $100 worth of labor or improvements annually for the benefit of each mining claim until a patent is issued. Oil shale was initially subject to location under the general mining laws. However, the Mineral Leasing Act of 1920 (MLA) (30 U.S.C. § 181 *et seq*) removed oil shale from the category of locatable minerals and made it subject to disposition only through leasing under section 21 of the MLA (*id.* § 241). Section 37 of the MLA (*id.* § 193) saved from section 21's leasing provisions only those oil shale deposits found in "valid [mining] claims existent on February 25, 1920[27], and thereafter

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[27] Since all of the subject oil shale mining claims were located prior to February 25, 1920, BLM has categorized these claims as locatable minerals for purposes of determining whether the claimant has complied with Section 37. BLM has concluded that the claimant failed to maintain the

maintained in compliance with the laws under which initiated." Construing the MLA, the Supreme Court in *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970), held that if an oil shale claim is not "maintained" as required by section 37, it becomes void and its oil shale becomes "'subject to disposition only' by leasing to the United States." *Id.* at 53.

In 1994, the Solicitor and former Acting BLM Director issued a memorandum entitled "Guidelines for Validity Standards for Oil Shale Mining Claim Patent Applications" which determined that the claimant forfeits the oil shale mining claim to the United States if the claimant fails to perform "not less than $100 of labor or improvements upon each lode or placer claim held by the claimant for each assessment year following the assessment year of the lode or placer claim's location." 43 C.F.R. § 3851.1(b). See Attachment C (Guidelines for Validity Standards for Oil Shale Mining Claim Patent Applications.) When a claimant thus fails to maintain oil shale claims in compliance with the assessment work requirements of the Mining Law, the United States' rights intervene and the resumption doctrine no longer properly applies to these mining claims. *See Hickel*, 400 U.S. at 57; *John J. Herr*, 130 IBLA 349, 367 (1994).

On May 15, 1997, BLM declared null and void UMC Nos. 65858-65875 and UMC No. 66028 for failure to perform assessment work for the year ending July 1,

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subject claims "in compliance with the laws under which initiated" because of the claimant's failure to conduct annual assessment work, as evidenced by the failure to file assessment work filings with the Uintah County Recorder's Office covering various years between 1932 and 1970.

1931. These mining claims were included in patent application UTU 63241. Consequently, BLM's May 15, 1997 decision also rejected in part UTU 63241 and the relevant portion of the FHFC. However, inasmuch as BLM based its May 15th voidance decision on the mining claimant's failure to perform assessment work for only one year which was inconsistent with the 1994 guidelines, BLM rescinded its decision on June 12, 1997.[28]

BLM now has finished its review of the assessment work history for all 156 oil shale mining claims, including those covered by patent applications UTU Nos. 63241 and 65591, and has identified a substantial number of years that the claimant failed to file assessment work filings for each claim. See Attachment A. As mentioned above, the mining claims at issue here were located in 1917, 1918, and 1919. Consequently, in order to have been properly maintained, the claimant should have done assessment work on the claims for each year for a period of seventy-two to seventy-four years. See Attachment A and B. In fact, the claimant did not conduct assessment work for numerous years, as evidenced by the claimant's failure to file assessment work filings with the county for periods ranging in length from twelve to thirty-eight years. Thus, there are substantial periods of time for which no assessment work filings were filed for the subject oil shale claims and for which no assessment work is presumed to have been done on these claims. See Attachment A, Column i. The time period from

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[28] In a separate July 22, 1998, decision involving patent application UTU 65591, BLM accepted the claimant's withdrawal of Lot 5 of Section 4 from UMC No. 66033 due to an amendment of the notice of location.

July 1, 1931, to July 1, 1932, is the only time period for which no physical assessment work and assessment work filings were required, and was not considered for purposes of determining the total number of nonperformance years.

Utah law requires holders of mining claims filed pursuant to 30 U.S.C. § 28 to file annual assessment work filings within thirty days after completing work or improvements on the oil shale claim with the county recorder where the claim is located to avoid forfeiting the claim. Utah Code § 40-1-6 (1996). With the exception of the time period between July 1, 1931, to July 1, 1932, the year for which no physical assessment work and assessment work filings were required, Utah Code § 40-1-6 has required this annual filing since the mining claims were located. Filing assessment affidavits is *prima facie* evidence that assessment work was performed. Utah Code § 40-1-6(6).

There is no evidence that the claimant or its predecessors in interest performed or recorded annual affidavits of assessment work with the Uintah County Recorder's Office for substantial periods of time, even though state law requires holders of section 28 mining claims to comply with the mining laws. Therefore, the mining claimant has failed to demonstrate that he has performed qualifying assessment work, and the 156 oil shale mining claims identified in Attachment A are hereby declared abandoned and void for the claimant's failure to properly maintain the claims in compliance with the laws under which they were initiated.

This decision does not relieve you of the requirement to reclaim all areas disturbed by your activities, if any, on lands covered by the mining claims at issue. If you fail to reclaim the lands which are administered by BLM to BLM's satisfaction, BLM may take appropriate enforcement actions under 43 C.F.R. §§ 3809.1-1, 3809.3-2 and 3809.3-2(f). If reclamation is required, you must notify this office upon completion so that we may inspect the site.

You may appeal this decision to the IBLA, Office of Hearings and Appeals, in accordance with the regulations in 43 C.F.R. Part 4 and the enclosed Form 1842-1. If you decide to appeal, you must file a notice of appeal in this office at the above address within 30 days from receipt of this decision. You have the burden of showing that the appealed decision is in error.

If you want to seek a stay of the decision, you must file a petition for a stay with the IBLA in accordance with 43 C.F.R. § 4.21 and 43 C.F.R. § 3802.5(a). Copies of the notice of appeal and petition for stay must also be submitted to each party named in this decision, to the IBLA and to the appropriate Office of the Solicitor (see 43 C.F.R. § 4.413) at the same time the original documents are filed in this office. If you request a stay, you have the burden of proof to demonstrate that the stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal must show sufficient justification based on the following standards:

(1) The relative harm to the parties if the stay is granted or denied,

(2) The likelihood of the appellant's success on the merits,

(3) The likelihood of immediate and irreparable harm if the stay is not granted, and

(4) Whether the public interest favors granting the stay.

OPOLONIA L. ABEYTA

Opolonia L. Abeyta
Team Leader
Mining Law Adjudication

Enclosures
1. Attachment A
2. Attachment B
3. Attachment C
4. Form 1842-1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5281 September Term 2008

04cv00791

Filed On: March 13, 2009

Orion Reserves Limited Partnership,

Appellee

v.

Kenneth Lee Salazar, Secretary, U.S. Department of the Interior, et al.,

Appellants

.....

Consolidated with 07-5290

BEFORE: Ginsburg, Garland, and Griffith, Circuit Judges

ORDER

Upon consideration of appellee/cross-appellant's petition for panel rehearing filed on February 25, 2009, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5281 September Term 2008

04cv00791

Filed On: March 13, 2009

Orion Reserves Limited Partnership,

Appellee

v.

Kenneth Lee Salazar, Secretary, U.S. Department of the Interior, et al.,

Appellants

Consolidated with 07-5290

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellee/cross-appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk